MAR 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1132

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Petitioner,

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Petitioner.

Of Counsel:
McCONNELL, FREEMAN, CURTIS & McCONNELL,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions below	1, 2
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	13
Conclusion	19
Appendix A—Statutes involved	21
B—Opinion below	23
Judgment below	37
District Court's Findings and Conclusions	38

CITATIONS.

Cases.

Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F. 2d 896	17
Fashion Originators Guild v. Fed. Trade Com., 312 U. S. 457	14, 15
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211	13, 14
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207	16, 17
Moore v. Meade Service Co., 340 U. S. 944	13, 14
Moore v. Meade Service Co., 184 F. 2d 338	14
Moore v. Meade Service Co., 190 F. 2d 540	14

Radiant Burners v. Peoples Gas L. & Coke Co., 364 U. S. 656 ..... 16, 17
Radovich v. National Football League, 352 U. S. 445 .. 16
Simpson v. Union Oil Co., 377 U. S. 13 19
Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595 14
United States v. General Motors Corp., 323 U. S. 373 .. 19

Statutes.

28 U. S. C. § 1254 (1) 2
Clayton Act:
Sec. 4 and 16 (15 U. S. C. §§ 15 and 26) 2, 17, 21, 22
Sherman Act:
Sec. 1 and 2 (15 U. S. C. §§ 1 and 2) 2, 8, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Petitioner,

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc. (FNTDN) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on January 3, 1967.

CITATIONS TO OPINIONS BELOW.

The District Court rendered no opinion in entering judgment in favor of petitioner on its treble damage claim but entered findings of fact and conclusions of law in sub-

sequently denying petitioner injunctive relief. The findings and conclusions are printed in Appendix B hereto, *infra*, p. 38. The opinion of the Court of Appeals is as yet unpublished but is printed in Appendix B hereto, *infra*, p. 23.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 3, 1967 (App. B, *infra*, p. 37). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a plaintiff's "unclean hands", if established, bar it from recovery of damages and injunctive relief in a private antitrust action.

2. Whether a trade association may legally excuse or defend the adoption of rules which prohibit its members from using a competitor's services on the ground that such competitor's services constitute unfair competition.

3. Whether a small businessman who has won a jury verdict and judgment in an antitrust treble damage action should be put to the delay and expense of a second trial solely because the District Court did not give specific instructions to the jury on defendant's "unclean hands" theory of defense which instructions were in conflict with decisions of this Court.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 & 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 & 26. The foregoing statutes are printed in Appendix A, *infra*, p. 21.

STATEMENT.

This is a private antitrust action in which petitioner FNTDN recovered a $450,000 treble damage judgment following a three-week jury trial. The court below reversed the judgment and remanded the damage claim for a new trial on the ground that respondent's "unclean hands" defense, if established, barred recovery of damages and that the District Court committed prejudicial error in not specifically instructing the jury on this theory of defense.[1]

The case involves the business of providing services to retail florists for facilitating and promoting the inter-city exchange of flower orders. Petitioner sells flowers-by-wire services for profit. Respondent provides such services to its members as one of its trade association functions.

Respondent Florists' Telegraph Delivery Association (FTD) is the oldest and largest retail florist trade association in the United States. FTD was organized in 1910 as a voluntary association and was later incorporated as a Michigan not-for-profit membership corporation. Its membership is composed of approximately 11,000 retail florists or about one-half of the 22,000 retail florists in the United States (App. B, *infra*, p. 25).

Under the FTD by-laws members delegate the management of their association to an elected board of directors. The members agree to be bound by any and all by-laws and membership rules adopted by the board. Violation of

---

1. The court held: "The core of FTD's defense to both the damage claim and the claim for equitable (injunctive) relief is that . . . FNTDN's purpose and conduct preclude it from recovery on its damage claim and bar it from equitable relief under the 'clean hands' doctrine. Such defense, if established, would so bar FNTDN from both recovery of damages and injunctive relief" (App. B, *infra*, pp. 27, 28).

any by-law or membership rule subjects the offending member to loss of membership (Ex. R. 2-9).[2]

For years FTD enforced a rule, known as the dual membership rule, which prohibited FTD members from belonging to or using the services of competing flowers-by-wire organizations. This rule, among other practices, was challenged by the government in a civil action under the antitrust laws. The action was terminated in 1956 with entry of a consent decree which enjoined FTD from prohibiting dual membership or otherwise restricting the terms or conditions upon which FTD members could do business with other organizations (R. 292-5). FTD also enforced a rule, known as the mandatory clearinghouse rule, which required FTD members "to report to and clear through" the FTD clearinghouse all orders exchanged between them.[3] The latter rule was not challenged in the government action and remained in force until 1964 (R. 66-7; Ex. R. 35-6).

In 1958, following abolition of the dual membership rule, petitioner FNTDN was organized by Thomas J. O'Brien, a wholesale-retail florist, to sell flowers-by-wire services for a fee. FNTDN's services were offered on a subscription basis to one top-flight florist in each principal city in the United States (R. 68, 73-4). Such florists invariably were also members of FTD.[4] Two of the services FNTDN offered its subscribers were regarded by FTD as a form of unfair competition and provoked the antitrust violation in the case.

---

2. "R." refers to volumes I and II of petitioner's appendix in the court below. "Ex. R." refers to volume III of petitioner's appendix in the court below.

3. FTD charges a 5% fee for this clearing service which fee is the principal source of its operating income. In 1961 FTD received fees totaling $3,309,557 for clearing $66,191,147 in intercity flower orders (R. 66; Ex. R. 76).

4. As FTD conceded and the court below acknowledged, FTD's 11,000 membership included the leading florists in every significant community in the United States (R. 220-1; Ex. R. 57; App. B, *infra*, p. 25).

First, FNTDN offered a directory of its subscribers for use in the selection of florists to fill inter-city flower orders. Petitioner represented that the florist listed for each city was the best or a leading florist who would reliably fill an order with top quality flowers. Petitioner encouraged its subscribers to use its directory when selecting out-of-town florists but imposed no requirement for such use (R. 178-82). FTD's comparable directory included its entire 11,000 membership with as many as 160 members listed in some cities. FTD's directory provided no information which would assist a user in making a selection from among the listed members (R. 63-4).

At the trial respondent contended that the purpose of petitioner's directory was to induce a boycott by encouraging the exchange of flower orders between petitioner's subscribers to the exclusion of other FTD florists (App. B, *infra*, pp. 27, 28). Respondent further contended that FTD's clearing facilities were being misused because orders exchanged between subscribers using petitioner's directory were being cleared through the FTD clearinghouse (App. B, *infra*, pp. 27, 28).[5]

Second, petitioner provided dual advertisements in local telephone directory yellow pages in order to generate wire order business for its local subscriber. The advertisements contained the copy, "To send flowers anywhere, call AMERICA'S PHONE-ORDER FLORISTS. (No charge account

5. FTD's general manager at trial admitted that FTD's clearinghouse statistics disclosed no boycott by petitioner's subscribers but indicated "a possible trend toward non-FNTDN members possibly effecting a silent boycott in directing their orders" (R. 224-5; Ex. R. 48).

The evidence also disclosed that FTD's counsel had advised FTD's general manager that the mandatory clearinghouse rule not only permitted but required petitioner's subscribers, in their dual capacity as FTD members, to clear orders through the FTD clearinghouse (Ex. R. 35-6). Petitioner did not offer a competing clearing facility for this reason (R. 108, 118-9, 175-6). Petitioner's subscribers, as dual FTD members, paid FTD a 5% fee on all orders exchanged between them and cleared through the FTD clearinghouse.

needed) Just Order By Phone—Pay By Mail!—Phonaflower!" They listed the name, address and telephone number of petitioner's "Exclusive Representative" in that city (Ex. R. 10-11). FTD for a time purchased similar yellow page advertisements under its trade name. FTD's advertisements, however, listed all of its members in a particular city (R. 87-8).

At the trial respondent contended that petitioner's yellow page advertising described its exclusive representatives in such a manner and context as to mislead the public into believing that the FNTDN subscriber was the only local florist offering flowers-by-wire services or was an FTD member preferred by FTD over its other members (App. B, *infra*, p. 28).[6]

The pertinent trial evidence established that in a matter of months following petitioner's organization, FTD's general manager reported to the FTD board that petitioner "could pose problems" to FTD and that he would "continue to G-2 the situation" (R. 185-6; Ex. R. 26-8). It was generally agreed that FNTDN "could be a very disruptive influence on FTD", and that "very careful surveillance should continue on this operation" (R. 189-90; Ex. R. 29).

FTD members complained to FTD headquarters to do something about petitioner's allegedly unfair competition. The gist of these complaints was that FTD members who were subscribers of petitioner enjoyed an unfair advantage over their fellow FTD florists because petitioner's di-

6. This contention was made notwithstanding the fact that no mention of FTD appeared anywhere in petitioner's advertisement; that FTD's counsel advised FTD's general manager that he found no element of affirmative misrepresentation in the advertisement; and that no evidence was offered of actual consumer confusion (Ex. R. 35-6). Respondent, however, contended that deception was intended because FNTDN's president had said that readers "assume[d] right off the bat that we are the organization" (App. B, *infra*, p. 31). Petitioner invites the court to inspect its advertisements (Ex. R. 10-11).

rectory and yellow page advertisements made the listed florists the target for additional inter-city flower business (R. 192-3, 265-6, Ex. R. 30-4).

FTD's lawyer first advised caution but this advice gave way under member pressure for action.[7] At the August, 1960 FTD convention, FTD member Sheets proposed that a list of petitioner's subscribers be placed in the monthly FTD magazine so that loyal FTD members could identify these people and act accordingly (R. 388-94; 448).

Following the 1960 convention, FTD president Joseph Hynes told the association's general manager, "Damn it, John, you damn well better do something about this", referring to the petitioner (R. 223).

Accordingly, the FTD board adopted and published to the membership "effective immediately" in July, 1961, two rules which provided (Ex. R. 14, 52, 54):

> "No Active Member shall permit the publication of his shop name as a part of any list or directory of FTD florists a purpose of which is to encourage or influence Active Members appearing on said list or in said directory to exchange orders between themselves to the exclusion of other Active Members of FTD."; and
>
> "No Active Member shall advertise or hold out to the public in any manner with respect to flowers-by-wire orders that he offers an exclusive flowers-by-wire service, when other FTD members offer FTD service in the same area."

Petitioner's subscribers correctly understood that these rules were designed and intended to prevent them and other FTD florists from using FNTDN's directory and advertising services. As the court below observed, "FNTDN experienced a decline in its membership and an increase in the percentage of rejections in connection with franchises

7. FTD's counsel in October, 1959, advised the FTD board that "There is no way . . . we can exclude or prohibit members of FTD from participating in competing organizations and in a way that is what FNTDN is. It is legal and there is nothing we can do to prevent it" (Ex. R. 57).

offered to prospective members" (App. B, *infra*, p. 27). In fact, within a period of eighteen months all but seven of FNTDN's subscribers in three hundred cities had either resigned or permitted their FNTDN franchises to lapse at the renewal dates (App. B, *infra*, p. 27; R. 104-8; Ex. R. 15-24). FTD's rules were never revoked, modified, or suspended and continue in effect today (R. 343).

Petitioner's complaint alleged that FTD and its member co-conspirators had engaged in a continuing combination and conspiracy to unreasonably restrain trade in, and to monopolize or attempt to monopolize for FTD, the business of providing flower wire order services to retail florists in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2). The complaint alleged that the above-quoted rules were designed and intended to prevent FTD members from using petitioner's directory and yellow page services in order to eliminate petitioner as a competitor in the flowers-by-wire business (R. 29-30). The evidence that the rules were so intended convinced the jury.

FTD director Gifford testified that at the board meeting when the rules were adopted, during which no minutes were kept, "it was stated many times in the executive session that [the adoption of the membership rules] would have a serious effect on FNTDN" (R. 143-8). Following announcement of the rules, FTD's general manager Bodette admitted to petitioner's president that it "seemed to be obvious" that the rules "were aimed at his organization" (Ex. R. 49; R. 227-8). When petitioner's president said that the rules would put petitioner out of business, Bodette replied that FNTDN "will have to take it to court" (R. 94).

At the August, 1961 FTD convention, Bodette remarked that the new rules came about as a result of the remarks made on the floor of the convention the preceding year, at which Sheets had proposed a boycott (R. 98, 229-30). Bodette further wrote (Ex. R. 50):

"Yes, the new rules are aimed at FTD members who belong to other organizations. We will spell out the application of the rules in some detail after the membership committee meets in Montreal . . . However, there is no doubt that they are aimed at FNTDN . . ."

Former FTD president Minshall testified that it was said by an FTD district representative that the rules "were expressly intended to stop FTD members from joining the organization that is now suing FTD", referring to petitioner (R. 353-6). And FTD director Clemenson admitted that he voted for the rules to "block the network", referring to petitioner (R. 98-102).

Respondent's jury defense was that the rules were reasonable measures to protect its members from petitioner's unfair trade practices (the alleged boycott and misleading advertising). It disclaimed any intent to injure or destroy petitioner's business (App. B, *infra*, pp. 27, 28). All of respondent's evidence on this theory of defense was admitted by the trial court and FTD's counsel argued its position fully to the jury (R. 56-7, 441-54).[8]

8. Respondent also placed in evidence, with the District Court's approval and over petitioner's objection, correspondence with the Antitrust Division of the Department of Justice, which FTD claimed expressly cleared and approved the membership rules which put petitioner out of business (R. 149-53, 302-7, 451). This contention was made notwithstanding a 1963 Justice Department letter to the effect that the rules would violate the 1956 consent decree if interpreted and applied in a manner which prohibited FTD members from using the flowers-by-wire services of a competitor (Ex. R. 85-6).

In the court below respondent reiterated its claim that the rules had been cleared by Justice. The Justice Department filed a memorandum *amicus curiae* in the court below denying that any such clearance had been granted and stating that it only advised FTD on the basis of the latter's *ex parte* submission that the Antitrust Division would take no action under the consent decree by reason of the adoption of the rules (see footnote reference to the government's memorandum *amicus curiae* in the opinion of the court below at App. B, *infra*, p. 36). A copy of the government's *amicus* memorandum is transmitted with this petition.

On August 1, 1966, the Department of Justice filed a new civil complaint, alleging that FTD was conspiring to "police and re-

The court, over petitioner's objection, instructed the jury that "the antitrust laws do not prevent trade associations from adopting reasonable rules and regulations to protect their interstate trade and commerce from destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis" (R. 467, 458). The court, over petitioner's objection, further instructed the jury that the membership rules on their face were not unlawful, regardless of their effect on petitioner's business, and would be unlawful only in the event the jury found that the rules were "adopted and published with the *specific* intent of destroying plaintiff's business" (R. 467, 458).[9]

On the issue thus framed, the jury returned a $150,000 general verdict in favor of petitioner. The District Court denied respondent's motion for judgment notwithstanding the verdict or alternatively for a new trial and entered judgment on the verdict. The District Court, however, entered findings of fact and conclusions of law and a separate judgment denying petitioner injunctive relief.[10]

---

strict the competitive activities of member florists, including their advertising practices, affiliation with directories and lists of competitive floral associations . . . .". *United States* v. *Florists Transworld Delivery Assn.* (E. D. S. D. Mich, Civ. No. 28784) 5 CCH Trade Reg. Rep. ¶ 45,066 (Case 1904).

9. In the hearing on instructions, respondent's counsel argued that intent was the key to the violation. He stated, "If it was intent, intent to drive you out of business, the rule is bad. But the rule is perfectly lawful on its face. Our defense is that there wasn't such intent. That is what we are fighting about, intent" (See p. 2-A of petitioner's supplemental appendix attached to its answer and reply brief in the consolidated appeals in the court below). The District Court's entire charge appears at R. 458-69.

10. The court below reversed the District Court's judgment denying injunctive relief on the ground that the District Court was estopped from entering findings contrary to the jury verdict (petitioner's consolidated appeal No. 15719). The court below nevertheless declared that on new trial respondent's unclean hands defense, if established, would bar recovery of injunctive relief as well as damages (App. B, *infra*, p. 28).

On appeal from the money judgment respondent conceded that the complaint stated a claim for relief under the antitrust laws; that no error had occurred in the reception or rejection of evidence; that all of its evidence concerning petitioner's unfair practices had been before the jury; that no error existed with respect to any instructions actually given; and that, assuming the jury had been adequately instructed, sufficient evidence existed to support the verdict.[11]

FTD appealed and the court below reversed solely on the ground that the trial court committed prejudicial error in failing to give three instructions which further and more fully detailed defendant's "unclean hands" theory of defense.[12] The three instructions which the court below held should have been given are reproduced in the margin below.[13]

---

11. See briefs in the court below, copies of which have been transmitted with this petition. See also Appendix B, *infra*, p. 25.

12. Respondent also made a perfunctory argument that the damage amount was speculative. The Court of Appeals finds this contention to be without merit (App. B, *infra*, pp. 33-4).

13. *Defendant's Requested Jury Instruction No. 18:*
"Defendant FTD, on the other hand, claims that it neither threatened, or engaged in, a boycott of plaintiff's franchisees; and that it neither threatened nor took disciplinary action against its members who were franchisees of plaintiff. Further, defendant denies that it adopted its membership rules with the intent or design claimed by plaintiff. *Defendant concedes that the rules were aimed at practices of the plaintiff which it alleges were injurious to competition among its member florists and contrary to public policy, if not illegal.* These practices of the plaintiff, claims the defendant, were against public policy because: (a) The yellow page ads placed by the plaintiff for its franchisees *were* intentionally designed by the plaintiff to deceive the flower buying public into believing that plaintiff's franchisee was the exclusive representative of the defendant FTD and the only florist in the community who could send flowers-by-wire; (b) These same yellow page ads *were* intentionally designed by the plaintiff to deceive the flower buying public into believing that the plaintiff's franchisee was offering to accept flowers-by-wire orders on credit from anyone, regardless of whether the purchaser was a good

In the tendered instructions respondent "concede[d] that the rules were aimed at the practices of the plaintiff" and were intended to protect "competition among its member florists" by prohibiting them from using petitioner's directory and yellow page services. These instructions, the court below declared, set forth respondent's "unclean hands" defense theory "that FNTDN was engaged in a boycott of other FTD members; that FNTDN was deceptively advertising its members as exclusive wire order florists and preferred FTD members; that FTD's intent in adopting the rules in issue was not to destroy FNTDN's business, but to protect FTD's members against FNTDN's boycott and deceptive activities" (App. B, *infra*, p. 32).

Acknowledging that the District Court gave respondent's

---

credit risk; and (c) The plaintiff's directory listed FTD members who had purchased plaintiff's franchises *for the purpose* of encouraging or influencing those members to exchange orders between themselves to the exclusion of all other FTD members. Defendant claims that plaintiff was thereby promoting a boycott by the plaintiff's franchisees of other members of FTD. Defendant asserts that it acted at all times in good faith and took every reasonable precaution to assure the legality of its actions" (Emphasis added).

Defendant's Requested Jury Instruction No. 29:

"In considering whether these rules were specifically intended to drive the plaintiff out of business or were intended to be only a reasonable means to protect interstate trade and commerce in flowers-by-wire orders from destructive and injurious practices, you may consider whether FTD, in good faith, *believed* that: (a) The purpose of the plaintiff's roster was to encourage or influence FTD members who had purchased plaintiff's franchises to exchange flowers-by-wire orders between themselves to the exclusion of other members of FTD; and (b) the yellow page ads of the plaintiff intended to deceive the public into believing that it was only the plaintiff's franchised florist who offered flowers-by-wire in the community" (Emphasis added).

Defendant's Requested Jury Instruction No. 29A:

"In considering whether the acts of defendant were intended to be only a reasonable means to protect interstate trade and commerce from destructive and injurious practices, you may consider all of the surrounding facts and circumstances of which FTD had knownedge or which FTD reasonably *believed* to exist." (Emphasis added).

general instructions on its unclean hands defense, the court below nevertheless held that, "The [district] court gave no instruction specifically setting forth or relating to FTD's theory of defense" and thereby committed reversible error requiring a new trial (App. B, *infra,* pp. 32-3).

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below sustaining respondent's "unclean hands" defense directly conflicts with the decisions of this Court in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, and *Moore* v. *Mead Service Co.,* 340 U. S. 944. The court below sought to distinguish *Kiefer-Stewart* and "similar decisions" on the ground that "the unclean hands defense here asserted does not relate to a transaction or subject matter other than the one in suit." It observed, "both FNTDN's activities and FTD's challenged rules were concerned with the same transactions—the distribution and processing of inter-city flowers-by-wire orders by FTD members via the FTD clearinghouse" (App. B, *infra,* p. 29). Petitioner submits that the attempted distinction does not resolve the conflict.

In *Kiefer-Stewart* respondents alleged as a defense and justification for their concerted refusal to sell liquor to petitioner the fact that petitioner was engaged in an illegal price fixing conspiracy with other wholesalers to fix liquor prices in excess of the maximum prices suggested by respondents. The trial court, however, instructed the jury that petitioner's part in such a conspiracy, even if proved, constituted no defense to the action. This Court agreed, stating:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the government or by injured private persons. The al-

leged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, . . ." (340 U. S. 214.)

In *Moore* the respondent similarly contended that it had cut bread prices in Santa Rosa, New Mexico while maintaining higher prices elsewhere in order to break a boycott of local grocers induced by his competitor, the petitioner before this Court. The Court of Appeals for the Tenth Circuit held "that the plaintiff by his own conduct and participation in an illegal boycott had created a condition which resulted in the price discrimination complained of and for that reason could not maintain the action" (184 F. 2d 338, 190 F. 2d 540, 541). This Court in a *per curiam* opinion vacated the judgment and remanded the case for further consideration in light of *Kiefer-Stewart.*

The unclean hands defense in *Kiefer-Stewart* and *Moore,* contrary to the court below, did not relate to a transaction or subject matter other than the one in suit. In each case plaintiff's conduct was urged as a defense because such conduct had created the very controversy which precipitated the defendant's violation. Nevertheless, this Court held that such alleged conduct, whether price fixing as in *Kiefer-Stewart,* boycotting as in *Moore,* or boycotting and misleading advertising as in the instant case, cannot excuse a retaliatory antitrust violation and thereby bar recovery of damages for injury to the plaintiff's business or property. Public interest in enforcement of the antitrust laws is paramount and may not be neutralized by permitting plaintiff's antitrust violation to cancel out defendant's violation so that the public is "caught in the cross-fire" of the wrongful conduct of the litigants. *Trebuhs Realty Co.* v. *News Syndicate Co.* (S. D. N. Y., 1957), 107 F. Supp. 595, 601.

This Court's reference to *Fashion Originators' Guild v. Federal Trade Com.*, 312 U. S. 457, in *Kiefer-Stewart* indicates that the decision below also conflicts in principle with the *Fashion Originators'* precedent. In the latter case this Court held that style piracy (the intentional copying and sale of original design clothing at cut-rate prices) could not excuse or justify the Guild's attempt to control such allegedly unfair trade practices by refusing to deal with retailers selling pirated garments.

The Guild sought to justify its efforts on the identical ground adopted as the basis for decision by the court below. The Guild contended that "the practices of F. O. G. A. were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against devastating evils occurring from the pirating of original designs, and had, in fact, benefited all four." The court below similarly reasoned that FTD might justifiably and lawfully adopt rules prohibiting its 11,000 florist members from using petitioner's directory and advertising services in the event such services were unfair or deceptive or injurious to fair competition.

Such attempted justification of a concerted refusal to deal was emphatically rejected in *Fashion Originators'* and should be similarly rejected here. Even if FNTDN's alleged boycott and misleading advertising "were acknowledged torts under the law of every state, that situation would not justify [FTD's membership] in combining together to regulate and restrain interstate commerce in violation of federal law" (312 U. S. 468). FTD in the florist industry, like the Guild in the fashion world, "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraining of interstate commerce . . ." (312 U. S. 465). FTD no more than the Guild may lawfully constitute itself "an extra-judicial tribunal" and adjudicate the fairness of the business practices of competitors as admittedly was attempted in this case.

II.

The decision of the court below, in adding "requirements to burden the private litigant beyond what is specifically set forth by Congress"[14] in the antitrust laws, conflicts in principle with the decisions of this Court in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, and *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U. S. 656.

In *Klor's* this Court held that a plaintiff who claimed injury to his business and property proximately caused by a concerted refusal to deal was not obliged to establish further that the public had also suffered some special injury by reason of his inability to do business. Such a restraint was "not to be tolerated because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy" (359 U. S. 213).

Faced with a similar concerted refusal to deal complaint in *Radiant*, this Court held that the Court of Appeals for the Seventh Circuit could not require the plaintiff to prove in addition to an unlawful restraint and consequent damage "that the public has been deprived of a product of overall-superiority" (364 U. S. 659).

Contrary to those decisions the "unclean hands" defense approved by the court below in effect requires petitioner to persuade a second jury that it did not engage in the unfair trade practices charged by the respondent. Where the defense of unclean hands is interposed, the court below holds that a private litigant must establish to the satisfaction of the trier of fact, not only a statutory violation and injury to its business and property but a third element as well, namely, the propriety of its business conduct.

Petitioner submits that the court below thereby judicially

---

14. *Radovich* v. *National Football League*, 352 U. S. 445, 454.

interpolated an added requirement beyond that set forth by the Congress in Section 4 of the Clayton Act. Such interpolated requirement, if allowed to stand in this case, will serve to defeat private actions just as the public injury doctrine did before this Court's decisions in the *Klor's* and *Radiant* cases.[15]

III.

The circumstances of this case warrant the exercise of this Court's supervisory power because the court below has remanded the case for a second and unnecessary trial on a theory of defense squarely in conflict with the decisions of this Court. Such a superfluous trial, in terms of further delay and expense, places an intolerable burden upon the petitioner.

It is undisputed and the court below acknowledges that FTD's membership rules had an immediate and continuing impact on petitioner's business (App. B, *infra*, p. 27).[16] Within a matter of months all but seven of petitioner's 300 subscribers had either resigned or let their memberships lapse at the first renewal date following announcement of the rules (App. B, *infra*, p. 27). The rules have never been revoked, modified, or suspended, and continue in force today (R. 343).

At the time of the announcement of the rules in July, 1961, petitioner's president complained to FTD's general manager, Bodette, that the rules would put petitioner out

15. Compare the Seventh Circuit's recent decision in *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company* (C. A. 7, 1966), 360 F. 2d 896, 900, holding that "where a plaintiff participates freely in the alleged anti-trust conduct, the *pari delicto* rule precludes recovery." The court held that a dealer was so barred from recovery of damages resulting from an exclusive dealing requirement in his dealer's franchise contract voluntarily entered into with defendant.

16. In the court below respondent conceded the "fact of damage." See briefs filed in the court below.

of business, and Bodette replied, "[You] will have to take it to court" (R. 94).

Petitioner filed the instant action two months later, in September, 1961. Discovery was taken and petitioner pressed for an early trial because of the continuing impact of the rules on its business. The case was not tried, however, until January, 1966.[17] During all of this period petitioner was out of business.

This court is aware of the large expense involved in antitrust litigation.[18] The instant trial took three weeks. There is no reason to believe that a second trial will take any less time. Few litigants can afford the expense of one three-week trial, let alone a second trial.

Petitioner is a small businessman. For six years it has diligently prosecuted its lawsuit in a so far futile attempt to secure relief from a continuing antitrust violation and to restore its business as a going concern.

Unless reversed, the decision below will require petitioner to stand the further delay and expense of a second trial on a theory of defense which flies in the teeth of this Court's decisions and which a jury has already seen fit to reject. Should respondent on remand secure a jury verdict on this false theory and should this Court then grant certiorari, the only relief the Court could give would be to remand the case for a third trial.

---

17. The case was initially set for trial in October, 1963. This setting was vacated and thereafter, over a two-year period, the District Judge set the case for trial on fifteen separate occasions. These trial dates were subsequently vacated by the District Judge on his own motion. The case was finally tried in January, 1966, only after petitioner filed a motion with the District Judge requesting that he transfer the case to the Court's Executive Committee for reassignment because of its inability to get a trial. The motion to transfer and reassign was denied on January 24, 1966. The motion was not printed in petitioner's appendix in the court below but a certified copy has been transmitted with this petition.

18. The taxable costs alone in the courts below were in excess of $13,500.

Under these circumstances the interlocutory character of the decision below should not be a ground for denying certiorari. This Court has held that where an important and clear-cut issue of law is presented which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, the case may be properly reviewed despite its interlocutory status. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; Cf. *Simpson* v. *Union Oil Co.*, 377 U. S. 13. The instant case, petitioner submits, presents such a clear-cut issue of law.

Unless the court grants certiorari at this time, petitioner will be financially exhausted before this already protracted litigation reaches a conclusion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Petitioner.

Of Counsel:
MCCONNELL, FREEMAN, CURTIS
& MCCONNELL,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

APPENDIX A.

The statutory provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal : . . ."

Section 2 of the Sherman Act, 15 U. S. C. § 2, providing in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

Section 4 of the Clayton Act, 15 U. S. C. § 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act, 15 U. S. C. § 26, providing in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over

the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ".

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

September Term, 1966 — September Session, 1966.
Nos. 15719 and 15720.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., *Plaintiff-Appellant (Appellee in No. 15720)*
v.
FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation, *Defendant-Appellee (Appellant in No. 15720)*

Consolidated Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 3, 1967.

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This antitrust action was brought in the District Court by the plaintiff, Florists' Nationwide Telephone Delivery Network — America's Phone-Order Florists, Inc., (hereinafter FNTDN) against the defendant, Florists' Telegraph Delivery Association, (hereinafter FTD). Plaintiff FNTDN sought to recover treble damages, and an award of injunctive relief. In its second amended and supplemental complaint FNTDN alleged,

among other things, that defendant FTD and its members co-conspirators were engaged in a continuing combination and conspiracy to unreasonably restrain trade in and to monopolize or attempt to monopolize for FTD the business of providing flower wire order[1] services to retail florists, in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. A. §§ 1, 2). It was alleged that the combination and conspiracy consisted of a continuing agreement, understanding and concert of action by FTD and its member co-conspirators to cause FTD members to cease and refrain from doing business with and from using the flowers-by-wire services of plaintiff FNTDN, in order to eliminate FNTDN as a competitor and to destroy its business. And that for the purpose of carrying out the combination and conspiracy FTD adopted and promulgated membership rules, violation of which subjects the offending subscribing florist to suspension or revocation of his FTD membership, which are designed and intended to prevent FTD members who are also subscribing florists of FNTDN from advertising their affiliation with FNTDN and to prevent such FTD members from permitting their names or shops to be listed in FNTDN's membership directory.

FTD's answer denied the allegations above referred to, and denied FTD's participation in any conspiracy or that it had otherwise violated the antitrust laws.

Plaintiff FNTDN filed a demand for a jury trial, and following such trial the jury returned a general verdict in favor of FNTDN and assessed its damages in the amount of $150,000. The District Court entered judgment on the verdict in the trebled amount of $450,000. together with costs and a reasonable attorney's fee. The court denied defendant FTD's motion for judgment in accordance with

1. Orders for flowers accepted by a retail florist for delivery in another city or area, and which order is sent by such florist (by telephone, telegram or other communication) to a retail florist in the other city to be filled and delivered by the latter.

its motion for a directed verdict[2] or, in the alternative, for a new trial.

With respect to the claim for injunctive relief, the court, without further hearing, made and entered findings of fact and conclusions of law upon the basis of which it entered an order denying FNTDN's prayer for the injunctive relief.

Plaintiff FNTDN appealed from the judgment order denying it injunctive relief. (Appeal No. 15719.) Defendant FTD appealed from the money judgment against it. (Appeal No. 15720.)

In its appeal from the money judgment against it FTD contends that the District Court refused to instruct the jury on FTD's theory of defense and thereby committed error requiring reversal, and that the evidence adduced to establish FNTDN's damages was too speculative and conjectural to sustain the verdict.

In FNTDN's appeal from the denial of injunctive relief against FTD it is contended by FNTDN that the trial judge was estopped by the jury's verdict from entering findings contrary to issues decided by the jury, and that having established a continuing antitrust violation FNTDN was entitled to an injunction as a matter of law.

The record discloses that FTD is the oldest and the leading organization of its kind in the United States. It was organized in 1910 as a voluntary association and later became a not-for-profit membership association incorporated under the laws of Michigan. FTD's membership includes the leading florists in each significant community in the United States. It has a membership of approximately 11,000 retail florists. There are about 22,000 such florists in the United States. FTD's principal function is the op-

2. Defendant's motion for a directed verdict at the close of the evidence was denied in part without prejudice, and the ruling on the balance was reserved.

eration of a clearing house through which its members clear payment of flower orders exchanged between them, and which provides the mechanism that enables its members to accept, transmit and fill intercity orders—an order placed by a consumer in one city for the delivery of flowers in another city or community. The consumer's payment for such an order is received by a local FTD member florist who sends the order for execution to a fellow FTD florist of his own choosing in the destination city. The selection is made from the FTD membership list or directory. The consumer's florist accounts to FTD for the payment he receives. The destination florist fills the order from his own stock, in reliance upon the guaranty of the FTD clearing house that he will be paid. FTD is supported by annual membership dues, plus advances of 5% on orders handled for members by its clearing house. Such advances are used to defray clearing house costs and the expense of advertising and promotional activities performed by FTD on behalf of all of its members.

FNTDN was organized in 1958 and incorporated in 1959 as a Delaware corporation for profit. Its founder and president is Thomas O'Brien, an FTD member since 1939, and the owner-operator of both retail and wholesale florist establishments in Chicago, Illinois. FNTDN offers its franchises, for which an annual fee is paid, to selected FTD members but its membership is limited to one FTD florist per city. FNTDN does not operate a flower order clearing house. Its members, being also FTD members, utilize FTD's clearing house for the clearance of flower orders exchanged between them. The principal services FNTDN provides its franchisee-members are the furnishing of a directory of its "selected" members, each of whom is represented to be the best, or one of the leading FTD florists, in the particular city in which he is located; dual listings in the "yellow pages" advertising section of telephone di-

rectories under each of FNTDN's compound names "Florists' Nationwide Telephone Delivery Network" and "America's Phone-Order Florists"; and the central purchasing of floral supplies at cost savings.

In 1961 FTD adopted two new rules which became effective July 17, 1961, and provided:

> "No Active Member shall permit the publication of his shop name as a part of any list or directory of FTD florists a purpose of which is to encourage or influence Active Members appearing on said list or in said directory to exchange orders between themselves to the exclusion of other Active Members of FTD."

and:

> "No Active Member shall advertise or hold out to the public in any manner with respect to flowers-by-wire orders that he offers an exclusive flowers-by-wire service, when other FTD members offer FTD service in the same area."

Subsequent to the publication of such rules FNTDN experienced a decline in its membership and an increase in the percentage of rejections in connection with franchises offered to prospective members. Within a period of eighteen months all but seven of FNTDN's members had either resigned from FNTDN or permitted their FNTDN franchises to lapse at the renewal dates.

The core of FTD's defense to both the damage claim and the claim for equitable (injunctive) relief is that the dominant purpose of FNTDN is centered in a scheme which involves misuse of FTD's clearing house facilities by those FTD members who are franchised by FNTDN to, in effect, boycott all other FTD members by exchanging intercity flower orders between themselves to the exclusion of other FTD members, and through such exclusive reciprocation obtain for each FNTDN member the major share of wire orders for the delivery of flowers in the city in which such

member is the sole franchisee of FNTDN; that in furtherance of this purpose FNTDN advertises its franchisees as "exclusive representative" in such manner and context as is designed to deceive and mislead the public into believing that the FNTDN member is the only local florist offering "flowers-by-wire" service or is an FTD member preferred by FTD over its other members; that the FTD rules complained of are but reasonable methods of self-protection against such boycott and unfair and deceptive advertising practice on the part of FNTDN, are designed to preserve fair competition between FTD's own members and to safeguard the integrity of FTD's own services for the benefit of its members, and do not violate Section 1 or 2 of the Sherman Act or afford any basis for liability on the part of FTD for any losses sustained by FNTDN; and that FNTDN's purpose and conduct preclude it from recovery on its damage claim and bar it from equitable relief under the "clean hands" doctrine.

Such defense, if established, would so bar FNTDN from both recovery of damages and injunctive relief. *Union Leader Corporation* v. *Newspapers of New England, Inc.*, 1 Cir., 284 F. 2d 582, cert. denied, 365 U. S. 833, rehearing denied, 365 U. S. 890; Cf. *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company*, 7 Cir., 360 F. 2d 896, 900. In *Union Leader* it is pointed out (284 F. 2d 582, 586-587):

> "To the extent that a party has merely sought to offset the other's illegal acts it has not acted with a wrongful intention, nor should its conduct result in public injury. In such a case there would be no reason to encourage recovery by the original offender, and every reason not to."

and the Court refers to the similar rationale reflected by the observation in *Times-Picayne Publishing Co.* v. *United States*, 345 U. S. 594, 623, that:

> "[A]n unlawful trade practice may not be justified as

> an emulation of another's illegal plan. . . . But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge."

Likewise, although factually distinguishable, *Crest Auto Supplies* exemplifies an application of the "clean hands" doctrine which is pertinent here. Both FNTDN's activities and FTD's challenged rules were concerned with the same transactions—the distribution and processing of intercity flowers-by-wire orders by FTD members via the FTD clearing house. Unlike the situation involved in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, and similar decisions relied upon by FNTDN, the "unclean hands" defense here asserted does not relate to a transaction or subject matter other than the one in suit. And, an association of business firms has the right to enact reasonable regulations governing trade practices of its member-competitors. *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231; *White Motor Co.* v. *United States*, 372 U. S. 253, 261. In *Board of Trade, supra*, it is stated:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable

regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

FNTDN's reliance upon such cases as *Associated Press* v. *United States,* 326 U. S. 1; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457; and *Silver* v. *New York Stock Exchange,* 373 U. S. 341, is misplaced. The classes of restraints there involved were on their face unduly restrictive in relation to the particular industry.

Silver involved an absolute, unqualified and unexplained ban on dealings with an outsider—a collective determination by the New York Stock Exchange, described by the Court as occurring "under totally unjustifiable circumstances" and as constituting "a *per se* violation of the Sherman Act" unless it was exempt from application of the antitrust laws—requiring a member house to terminate private wire service to a nonmember broker. In *Associated Press* the rule condemned empowered each member to block the application of any competing newspaper for membership. Thus, on its face, the rule constituted a restraint of trade which the Court characterized as "plainly designed in the interest of preventing competition." *Fashion Originators' Guild* involved a combination of garment designers, garment manufacturers, and textile suppliers. The members boycotted and refused to sell their products to any retailer who sold garments copied from designs put out by the Guild members. It was held that the purpose and practice of the combination ran counter to the public policy declared in the Sherman and Clayton Acts. We perceive nothing in the case which impairs the validity of *Board of Trade,* supra.

Our examination of the record convinces us that it contains testimony and other evidence from which the jury reasonably could have concluded that the purpose and the activities of FNTDN were directed to effecting an exclu-

sive exchange of intercity flower orders between the FNTDN members of FTD with the resulting boycott of other FTD members—an attempt to use FTD's own facilities to "skim the cream right smack off the top of all the intercity business in the country"[3] for the benefit of the one FNTDN franchisee in each city. And that FNTDN advertisements were designed to lead the readers to "assume right off the bat when they read our name that we are the organization,"[4] and to mislead the public into believing the FNTDN member was the exclusive or preferred flower-by-wire florist in his city.

Indeed, the trial judge so appraised the record in his findings and conclusions which formed the basis for his denial of injunctive relief.[5]

3-4. Statements contained in an explanation of FNTDN's program made by its president, Thomas O'Brien, in demonstrating what might be a typical sales approach to a prospect for an FNTDN franchise.

5. The trial judge found and concluded, *inter alia:*

"... Further, Plaintiff [FNTDN] utilized yellow page advertising listings which I find would be mistaken by the public as being designations by Defendant Association [FTD] of one or more of its members preferred by it over the other of its members in particular cities or areas."

"The avowed purposes of [FNTDN] in setting up and developing its business were: (a) to make profits from franchise costs and affiliation fees; (b) to provide those retail florists buying its franchises with a procedure whereby they could obtain from members of [FTD] a larger share of the flower-by-wire business in their respective areas or cities than would be obtained by other members of [FTD] in those areas or cities; and (c) to cause the general public to believe that in dealing with [FNTDN's] affiliates they were dealing with members of [FTD] whom [FTD] preferred over its other members."

* * *

"The activities of [FNTDN] constituted a procedure which, in effect, was a boycott against the members of [FTD] who were not affiliates of [FNTDN], and as such were against public policy."

"The activites of [FNTDN] were in part the utilization of

The court gave the jury a general instruction to the effect that the rules complained of do not on their face constitute unreasonable restraints of trade but that if they were adopted and published with specific intent to destroy plaintiff's business such intent would convert the adoption and publication from lawful to unlawful acts, and that while trade associations may not adopt protective rules when the purpose or direct effect is to force competitors out of business, the antitrust laws do not prevent the adoption of reasonable rules and regulations to protect against destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis. But the court refused to give instructions tendered by FTD which set forth the defense theories that FNTDN was engaged in a boycott of other FTD members; that FNTDN was deceptively advertising its members as exclusive wire order florists and preferred FTD members; and that FTD's intent in adopting the rules in issue was not to destroy FNTDN's business, but to protect FTD's members against FNTDN's boycott and deceptive activities. The court gave no instruction specifically setting forth or relating to FTD's theory of defense although as hereinbefore pointed out there was testimony and other evidence to support it.

A party is entitled to instructions presenting his theory

---

fraudulent representations and deceit, and the sale of its services was made possible by such fraudulent representations and deceit, and as such its activities were against public policy."

* * *

The trial judge further found and concluded that FTD members are free to join and many have joined competing flower-by-wire services without loss of membership in FTD, and that although the rules adopted by FTD relating to the conduct of its members were directed at the policies of FNTDN, they were not such a restraint upon FNTDN's activities as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition in the industry, while protecting the integrity of FTD's own service for the benefit of its own members.

of the case if there is evidence to support it. *Allers* v. *Bohmker*, 7 Cir., 199 F. 2d 790. And this right is not satisfied by a general instruction as distinguished from specific instructions on the theory of defense which cover or relate to the various elements of that theory for which there is record evidentiary support. *Chicago & North Western Railway Company* v. *Rieger*, 8 Cir., 326 F. 2d 329, 336. And even where the requested instruction is not entirely perfect there are situations where the court is not relieved of its duty to give the substance of the requested instruction where it appears that an instruction on the issue is needful to enable the jury to intelligently determine the question. *Rieger*, supra, 326 F. 2d 329, 334 and 336. This would appear to be particularly so in the instant case where in contrast to the court's silence on the defendant's theory of defense it did give instructions which had the effect of fully covering the plaintiff's theory of liability and read pertinent extracts from the plaintiff's complaint to the jury, and although the court prefaced or interspersed them with the characterization "it is alleged" or "it is charged" it gave no admonition that these allegations were mere accusations, not evidence.

On the damage claim phase of the appeals we conclude that, on the facts and circumstances here presented, the court's refusal and failure to instruct the jury on FTD's theory of defense constitutes prejudicial error which requires reversal of the judgment for damages and a remand to the District Court for a new trial.

In this connection we have considered FTD's contention that the evidence with respect to FNTDN's damages was too speculative and conjectural to furnish a sound basis for the amount allowed. We disagree. The principles recognized in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264-266; *A. C. Becken Co.* v. *Gemex Corporation*, 7 Cir., 272 F. 2d 1; and *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 7 Cir.

190 F. 2d 561, would, if the judgment could otherwise stand, preclude us from disturbing it insofar as the contentions advanced with respect to the amount of damages awarded and the basis therefor are concerned. We make this observation only because of the remandment for a new trial.

We turn to consideration of the issue raised in connection with the District Court's denial of injunctive relief. FNTDN contends that the trial judge was estopped from entering findings contrary to issues decided by the jury's verdict, and that having established a continuing antitrust violation FNTDN was entitled to an injunction as a matter of law.

FNTDN's complaint combined claims for damages and injunctive relief. In such case a trial of either claim before the other raises a collateral estoppel to the relitigation of those issues essential to the decision which are common to both claims and are decided in connection with the claim tried first. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36;[6] *Perryton Wholesale, Inc.*, v. *Pioneer Distributing Company of Kansas*, 10 Cir., 353 F. 2d 618, 623; Cf. *Local 167, I. B. T.* v. *United States*, 291 U. S. 293. This principle was recognized in *Bigelow* v. *RKO Radio Pictures, Inc.*, 7 Cir., 162 F. 2d 520, 522-523, although it was not there relied upon. In *Bigelow* the trial court's findings upon which the grant of injunctive relief was predicated were supported by the evidence earlier submitted on the damages claim and were neither contrary to nor inconsistent with the earlier determination of the defendants' violation of Sections 1 and 2 of the Sherman Act implicit in the general verdict returned by the jury on the treble damages claim.

FNTDN having demanded a jury trial it was mandatory

6. Under the facts presented in *Munsingwear* the bar to relitigation of the common issue was characterized as falling "squarely within the classic statement of the rule of *res judicata*," 340 U. S. 38.

that the treble damages claim be tried and disposed of before consideration of the equitable claim for injunctive relief. The issue of the alleged violation of the Sherman Act was common to both claims. And to proceed otherwise might, through operation "either by way of res judicata or collateral estoppel" deprive FNTDN of its right to a jury trial on its treble damages claim. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500.

But, under the principles established by the decisions above cited, the doctrine of collateral estoppel operated to preclude the District Court from predicating a denial of injunctive relief on a finding with respect to any essential issue common to both claims which finding is contrary to or inconsistent with the jury's resolution and determination of that same issue as implicitly reflected in its general verdict for FNTDN on the damages claim.

Of course, considerations peculiar to the award of equitable relief[7] and which are not common to those presented by the treble damages claim remain within the sole province of the trial judge and are to be resolved by him on the basis of the record of the jury trial (*Bigelow* v. *RKO Radio Pictures Inc.*, 7 Cir., 162 F. 2d 520, 522-523), or if they do not admit of resolution from the evidence adduced in connection with the damages claim, on such record as supplemented by such additional evidence as is adduced at a hearing for that purpose before the trial judge.

A consideration of the trial judge's findings and conclusions in the instant case discloses no factual or legal basis, supported by evidence, for the denial of injunctive relief on the premise of some independent equitable consider-

7. Section 16 of the Clayton Act (15 U. S. C. A. § 26) authorizes injunctive relief in private antitrust cases only "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . ."

ation not common to the issues involved in the damages claim, and as to these issues his findings are contrary to the determination the jury made on these same issues by its verdict. The trial judge, in effect, found for FTD on its theory of defense—the theory with respect to which he refused and failed to instruct the jury.

Thus, although our reversal and remand for a new trial voids the jury's verdict, and FTD is entitled to a new trial on the damages claim made against it, FNTDN, under the circumstances is entitled to a redetermination of its claim for injunctive relief subject, of course, to any estoppel which on retrial may flow from the jury's determination of the issues which are common to both claims.

In support of their basic contentions on appeal each of the parties advances certain subsidiary and peripheral contentions which we have given consideration but which, in view of the conclusions we have reached, we deem it unnecessary to discuss.[8]

Each of the judgment orders of the District Court appealed from is reversed, and the cause is remanded to the District Court for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL

8. The motion of the United States for leave to file a memorandum *amicus curio*, presented therewith, is granted. The memorandum has received our attention.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60604

Tuesday, January 3, 1967

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC.,
Plaintiff-Appellant.
(Appellee in No. 15720)

No. 15719, 15720 *vs.*

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation,
Defendant-Appellee.
(Appellant in No. 15720).

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court for a new trial, in accordance with the opinion of this Court filed this day.

MEMORANDUM ORDER DATED FEBRUARY 25, 1966.

This matter coming on to be heard on Plaintiff's motion for judgment on its plea for injunctive relief, and the Court having heard and considered all the evidence and being fully advised in the premises,

Finds as follows:

(1) Plaintiff was a "for profit" corporation offering franchises of "exclusive representation" to retail florists, one to a city or area, together with certain group buying and advertising services. Defendant was (and still is) the principal flower-by-wire facility or service in the country. It is a voluntary, not-for-profit, association of retail florists, furnishing, in addition to certain advisory, monitoring and advertising services, a clearing house to handle the financing of exchanges of floral orders by wire for its members.

(2) The only florists solicited by Plaintiff to be its city or area "exclusive representatives" were members of Defendant Association. In publishing a roster of its affiliates, the Defendant utilized the code numbers acquired by its affiliates by virtue of their membership in Defendant Association. Plaintiff furnished no clearing house and depended upon use by its affiliates of the clearing house of Defendant Association made available to them by virtue of their membership in Defendant Association. Further, Plaintiff utilized yellow page advertising listings which I find would be mistaken by the public as being designations by Defendant Association of one or more of its members preferred by it over the other of its members in particular cities or areas.

(3) The avowed purposes of Plaintiff in setting up and developing its business were: (a) to make profits from

franchise costs and affiliation fees; (b) to provide those retail florists buying its franchises with a procedure whereby they could obtain from members of Defendant's a larger share of the flower-by-wire business in their respective areas or cities than would be obtained by other members of Defendant in those areas or cities; and (c) to cause the general public to believe that in dealing with Plaintiff's affiliates they were dealing with members of Defendant whom Defendant preferred over its other members.

(4) Defendant Association adopted certain rules relating to the conduct of its members, which were directed at the policies of Plaintiff, and which contributed substantially to but were not the sole cause of Plaintiff's loss of affiliates and eventual demise. These rules were published, but no member of Defendant Association has ever been disciplined for violation of them.

(5) Members of Defendant Association are free to join and many have joined other flower-by-wire services without loss of membership in Defendant, but such other services have their own clearing houses.

6) Plaintiff brought this action under the Antitrust Laws, charging monopolization and conspiracy in restraint of trade, and asking, in addition to treble damages, for injunctive relief.

I conclude as follows:

(1) The rules adopted by Defendant Association were not such a restraint upon the activities of Plaintiff as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition within the same general industry, while protecting the integrity of its own service for the benefit of its own members.

(2) The activities of Plaintiff constituted a procedure which, in effect, was a boycott against the members of De-

fendant's Association who were not affiliates of Plaintiff, and as such were against public policy.

(3) The activities of Plaintiff were in part the utilization of fraudulent representations and deceit, and the sale of its services was made possible by such fraudulent representations and deceit, and as such its activities were against public policy.

(4) Defendant Association, not having enforced its rules, and Plaintiff, being free to apply for appropriate relief if and when upon the resuming of its business, if the same shall be resumed, the enforcement of whatever rules Defendant may then have which will in fact constitute a restraint upon trade affecting the success of Plaintiff's business, no imminence of impending danger exists of which Plaintiff may complain.

(5) The power of the Court to issue injunctions should be exercised with great caution, and only where the reason and necessity therefor are clearly established. *Calvert Distillers* v. *Wish*, 162 F. Supp. 364, affirmed 259 F. 2d 323; *Caterpillar Tractor Co.* v. *International Harvester Co.*, 106 F. 2d 769.

(6) Ordinarily, to warrant injunctive relief, it must clearly appear that some act has been done which, unless it is undone, or is threatened, and the threat is not removed, will produce irreparable injury to the party seeking relief. *Baltz* v. *The Fair*, 178 F. Supp. 899; *Hecht Co.* v. *Bowles*, 64 S. Ct. 587, 321 U. S. 321; *Bowles* v. *Lentin*, 151 F. 2d 615, cert. denied, 66 S. Ct. 958, 327 U. S. 805.

(7) An injury is irreparable when it cannot be adequately compensated in damages. *O'Malley* v. *Chrysler Corp.*, 160 F. 2d 35; *Walling* v. *T. Buehner and Co.*, 133 F. 2d 306, cert. denied, 319 U. S. 771.

(8) The Court will deny injunctive relief to a plaintiff, even though he shows himself to have a right to some rem-

edy, when it appears that he himself acted dishonestly, fraudulently, or illegally, in respect of the matter in which redress is sought, or when he has encouraged, invited, or contributed to the injury sought to be enjoined. *Nice Ball Bearing Co.* v. *Bearing Jobbers, Inc.*, 205 F. 2d 841, cert. denied, 346 U. S. 911; *American Co-op Serum Assn.* v. *Anchor Serum Co.*, 153 F. 2d 907; *In re Thomas*, 204 F. 2d 788.

NOW, THEREFORE, in view of the foregoing, it is the judgment of the Court that Plaintiff's prayer for injunctive relief should be, and the same hereby is, denied.

ENTER:

JAMES B. PARSONS,
United States District Judge.

Date: February 25, 1966.

INDEX

	Page
The Opinion Below	1
Question Presented	2
Statement	2
The Parties	2
(a) Respondent's Organization and Method of Operation	2
(b) Petitioner's Organization and Plan of Operation	4
The Adoption of the Rules After Department of Justice Clearance	9
The Jury Instructions and Verdict	13
The Injunction Decision	17
The Decision of the Court of Appeals	17
Reasons For Denying The Writ	19
1. There is no question of general importance; only the limited issue of the proper jury instructions on the evidence in this particular case	19
2. There is no conflict with decisions of this Court	21
3. There is no conflict of Circuits	24
4. There are no circumstances warranting this Court's interlocutory consideration of the case, contrary to its usual practice	25
Conclusion	26
Appendix	1a

LIST OF CITATIONS

CASES:

Allers v. *Bohmker*, 199 F. 2d 790 (7th Cir. 1952)	18
American Construction Company v. *Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893)	25
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	19

Page

Board of Trade of the City of Chicago v. *United States*, 246 U.S. 231, 238 (1918) 15, 20

Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941) 23

Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc., v. *Florists' Telegraph Delivery Association*, 371 F. 2d 263, 267-71 (7th Cir. 1967) 1, 14, 18, 19, 20, 22, 24

F.T.C. v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, (1945) 24

F.T.C. v. *Dilger*, 276 F. 2d 739, 744 (7th Cir. 1960); cert. denied 364 U.S. 882 (1960) 2a

Gillespie v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964) 25

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-58 (1916) 25

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), rehearing denied 340 U.S. 939 (1951) 21, 22, 23, 24

Moore v. *Mead Service Co.*, 340 U.S. 944 (1951), on remand 190 F. 2d 540 (10th Cir. 1951), cert. denied 342 U.S. 902 (1952) 23, 24

Times-Picayune Publishing Company v. *United States*, 345 U.S. 594, 623 (1953) 20, 25

Union Leader Corporation v. *Newspapers of New England, Inc.*, 284 F. 2d 582, 586, 587 (1st Cir. 1960), cert. denied 365 U.S. 833 (1961), rehearing denied 365 U.S. 890 (1961) 24, 25

United States v. *General Motors Corporation*, 323 U.S. 373 (1945) 26

White Motor Co. v. *United States*, 372 U.S. 253, 261 (1963) 20

MISCELLANEOUS:

Profile of the Retail Florist Industry 1964, U. S. Department of Agriculture, Economic Research Service, Report No. 741 3

Petition for a Writ of Certiorari, *Union Leader Corporation* v. *Newspapers of New England, Inc.*, (No. 658, 1960 Term) 25

RECORD REFERENCES

The following abbreviations are used in this brief.

Petition for a writ of certiorari ..... Pet.

Petitioner's printed appendix Vols. I, II, III ..... P I, P II, P III

Respondent's printed appendix .....RA

Respondent's supplemental appendix incorporated in its reply brief below .....DSA

Respondent's exhibits .....RX

Petitioner's original brief in Court of Appeals .....POB

Petitioner's answer brief in Court of Appeals .....PAB

Respondent's original brief in Court of Appeals ....ROB

Respondent's answer brief in Court of Appeals .....RAB

Petitioner's exhibits .....PX

Trial transcript .....Tr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1132

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC., A Corporation, *Petitioner*,

v.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

THE OPINION BELOW

The opinion of the Court of Appeals is now reported and appears at 371 F. 2d 263.

QUESTION PRESENTED

This case concerns the legality of two rules adopted by respondent, a non-profit membership corporation comprised of retail florists and engaged in processing their intercity, "flowers-by-wire" orders. The rules prescribed anti-boycott and honest advertising standards of conduct for respondent's members—requiring them to refrain from boycotting other members and from falsely advertising that they offered an exclusive flowers-by-wire service. The Antitrust Division of the Department of Justice twice cleared the rules—both before and after they were promulgated.

The only question is whether the Court of Appeals correctly held that the lower court committed prejudicial error in failing and refusing to instruct the jury concerning the defense theory that evidence concerning the background of the rules could be considered in deciding whether they were lawful under the applicable "rule of reason" criterion of the Sherman Act.

STATEMENT

The Parties: (a) Respondent's Organization and Method of Operation. Respondent FTD was organized in 1910 as a voluntary association and later became a non-profit membership corporation (Pet. 3).[1] It has about 10,500 member-owners in all significant communities of the United States (P II 402). Membership is freely granted without exclusive territorial restrictions. For example, FTD has 160 members in Chicago; 162 in New York and 49 in Milwaukee (P I 63).

---

[1] Pet. refers to Petition. The legend to other record reference abbreviations is contained in the section of the Index entitled "Record References", pp. iii, *supra*.

The great majority of FTD members operate exceedingly small businesses, with almost incredibly low *gross* annual sales.[2]

FTD conducts no business on its own behalf. Its principal function is to operate a clearinghouse which provides the mechanism by which its members can accept, transmit and fill intercity "wire" orders—*i.e.*, orders placed by a customer in one city for delivery of flowers by another florist in another city (P I 61, 65). Actual intercity transportation is precluded by the perishability of the product (P I 61-62).

The customer's payment for such an order is received by the local FTD member florist who sends the order for execution to a fellow FTD florist of his own choosing in the destination city (P I 62, 65). The customer's florist accounts to FTD for the payment he receives. The destination florist fills the orders from his own stock, in reliance upon the guaranty of the FTD clearinghouse that he will be paid (P I 65; RA 46). This is vitally important in an industry which is characteristically "undercapitalized" and suffers from "slow pay" (Tr. 416-417). FTD also guarantees that

---

[2] As reported by the United States Department of Agriculture:

"The retail florist industry comprised of approximately 22,000 establishments *truly qualifies as an industry of small businesses.* The annual sales average for all U. S. florists is slightly over $50,000.

"*Nearly two-thirds of retail florists in the United States have annual gross sales below $50,000* . . . . Almost 10 percent of all florists have annual sales between $100,000 and $250,000 . . . . Less than 2 percent of all florists have sales of $250,000 or more; . . . (PROFILE OF THE RETAIL FLORIST INDUSTRY 1964, U. S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, REPORT No. 741, at 4; emphasis supplied).

orders will be filled to the customer's satisfaction (P II 406).

FTD is supported by annual membership dues, plus advances of 5% on orders handled for members by its clearinghouse. Such advances are used to defray clearinghouse costs and the expense of advertising and promotional activities performed by FTD on behalf of all of its members. Unexpended portions of these advances are returned to the members *pro rata* (RA 46-47).[3]

Since the entry of the consent decree in 1956 (Pet. 4), FTD members have freely joined other wire service organizations and have freely cleared orders through their facilities (P II 406). The record shows, as follows, the growth of competing clearinghouse organizations and the number of FTD members with dual memberships (RX 91; DSA 29):

United States 1961-1964

	December 1961	September 1962	September 1963	July 1964
FTD	10,426	10,440	10,415	10,485
Teleflora	2,282	2,501	3,428	4,877
Dual FTD-Teleflora	369	505	900	1,648
Florafax	332	958	2,324	3,521
Dual FTD-Florafax	17	95	424	823

(b) Petitioner's Organization and Plan of Operation. Petitioner was founded in 1958 (Pet. 4), by Thomas J. O'Brien of Chicago, its president and principal stockholder. An FTD member since 1939, he is

[3] Each of the two florists participating in an FTD wire order pays 2% to support the organization's advertising and promotional activities. The destination florist pays another 1% which is used to cover the cost of administering the clearinghouse *(ibid)*.

one of the nation's largest florists with annual retail sales of $200,000 to $250,000 (P I 59-60, 62-63).

Petitioner was conceived as an organization restricted to a small clique of larger FTD members (RX 1, RA 62). They would comprise, in Mr. O'Brien's words, "the most exclusive club, as it were, in floristry" (RX 11, RA 71). They would be induced to pay petitioner substantial fees by the promise of greatly increased business. This would be achieved by a threefold program, involving preemption of the public's wire business by holding petitioner out to the public as respondent's long-established organization; limitation of petitioner's franchisees on an exclusive territorial basis; and the pursuit of exclusive reciprocal dealing among such franchisees. The exclusive franchisees' memberships in FTD would afford them access to its clearinghouse facilities and free petitioner of the burden of maintaining such facilities (P I 119-20).

The initial step was the choice of a name which admittedly simulated FTD and caused the public to misidentify petitioner as respondent. To quote petitioner's president (RX 11, RA 73; P I 154-55):

> "Our name is a great big mouthful to say. We did it purposely to begin with—we set it up as a network with a compound name specifically, so that we could divide it and by dividing it, qualify for two listings in the florist classification . . . . which we have already told you we give you.
>
> "The names, incidentally (*and not so incidentally*) are being recognized by users of the yellow pages as the principal florist inter-city order agent and that is the impression given to us by practically all callers that are using the service. *They just assume right off the bat when they read our name that we are the organization*

> . . . and this will prove to your benefit . . ." (Emphasis supplied).[4]

Petitioner traded on this confusion through the use of dual Yellow Page listings of its franchisees as "exclusive representative[s]." (P I 154; PX 4, 5, P III 10, 11). According to its president, "Yellow Page advertising"

> "is the most important form of advertising that can be done for the retail flower business and my entire business has been built and sustained on it, that is, I am referring to my retail flower business." (P I 86-87).

He emphasized that "the name of [his] corporation" were key words in his Yellow Page ads (P I 125).

Petitioner sold franchises, for annual fees averaging $300 to $320, and ranging as high as $725, on a "TRULY EXCLUSIVE", one-to-a-city basis (P I 72-73; RA 44; RX 1, RA 62). It conditioned the award of franchise on the continuation of "existing membership . . . in a wire-service organization" (RX 1, RA 62)—*i.e.,* FTD—thereby avoiding the burden of a separate clearinghouse (P I 119-20). To quote Mr. O'Brien (RX 11, RA 63-64; RX 23, RA 93; emphasis supplied)

> "Basically, we are (1) a sales organization. We are *not in the least like FTD*—we are not set up to be just another wire organization. Our services

---

[4] Two of the first four words and three of the first four initials of petitioner's name—"FNTDN"—were identical with respondent's—"FTD." Other flowers-by-wire organizations used distinctive names—e.g., Teleflora Delivery Service ("TDS") and Florafax (RX 91, DSA 29; P I 117-18).

go far and beyond those services provided by the FTD and TDS.[5]

> "As you know, they were set up initially to provide a clearing house function and *the FTD particularly is doing an admirable job of it, and we see no reason to begin to duplicate in that field.*"
>
> * * *
>
> "*All these stores* [FNTDN franchisees] *are members of FTD* and as such have their own fine clearing house which we do not duplicate: because under these circumstances such duplication of service would be wasteful."[6]

It was repeatedly proclaimed that petitioner contemplated a boycott of other FTD members. An early letter to one of petitioner's franchisees declared (RX 13, RA 83):

> "Enclosed is a preliminary list of those florists who like yourself have been admitted to membership in FNTDN.
>
> "One of our purposes of course is to increase the transfer of wire orders among our selected members and therefore it is recommended that you show favoritism to these companies when sending orders in to their territories. They, likewise, will give your company the same consideration when sending orders into your area."

Mr. O'Brien also testified that he urged exclusive-dealing among petitioner's members "for the whole

---

[5] TDS was a private profit corporation with its own clearing-house to process wire orders (P I 115-17).

[6] These pre-litigation admissions belie petitioner's belated claim that it was prevented by respondent from establishing a clearing-house (Pet. 5 n. 5). Other wire organizations had no such difficulty. See p. 4, *supra*; P I 117-20.

rest of the time I was in business, . . . every time I had the chance. . . . Of course I did." (P I 164). The monthly membership lists he sent to petitioner's franchise holders were accompanied by admonitions to practice exclusive reciprocal dealing, such as the following (RX 17, RA 89-90):

> "Are you faithfully sending your 'outgoing' [wire orders] to your fellow FNTDN members in their towns? Full co-operation is necessary.
>
> "This list is 'THE BIBLE' in my store. My employees have to look here first—and if there's an FNTDN member in the town—he gets the order. We make no exceptions to this rule.

On another occasion Mr. O'Brien sent the following directive to each member:

> ". . . be sure to explain the purpose of this preferred list to your employees and *be sure they use it* in sending orders to other cities, just like all the other FNTDN members are doing." (RX 15, RA 86; emphasis supplied).[7]

Mr. O'Brien admitted, as follows, petitioner's purpose to capture the "cream" of the wire order business for its franchisees—at the expense of other FTD members (RX 11, RA 71-72):

> "We are taking one key florist in each town throughout the whole country . . . [T]his means that you have a list of the finest florists throughout the country—and they also have YOUR name

---

[7] In another "confidential" memorandum Mr. O'Brien directed his franchisees

> "Remember to favor your fellow FNTDN member with your outgoing orders—Be sure your employees are using your preferred membership list." (RX 19, RA 92).

> in your town. So you become the prime objective of orders from what we expect to be somewhere between a thousand and fifteen hundred of our exclusive Representative Florists all over the country. *Obviously this is going to skim the cream right smack off the top of all the inter-city business in the country.*" (Emphasis supplied).

Petitioner's "Prospectus" to potential members proclaimed "astounding" success in that endeavor, stating (RX 1, RA 61):

> ". . . Our monthly copyrighted membership list which is sent to every member accomplishes all these things. It is a preferred list of the better florists, available only for the exclusive use of our members. It also makes each man in his town the *principal target for orders from fellow FNTDN members in all the other cities;*[8] while at the same time, he continues to receive his usual share of all the wire orders from other florists who send about 75% of their outgoing on a 'blind, guesswork' basis. Remember, we select just one outstanding florist in each town, and that makes the chosen shop a member of the most select group of florists in the world. *Via this activity we are accomplishing astounding increases in incoming wire business for our members, some of them reporting gains from 25% to 60% more than they were receiving before their affiliation with us.*"[9]

The adoption of the Rules after Department of Justice Clearance: Respondent's only action of which

---

[8] Emphasis in original.

[9] Emphasis supplied.

petitioner complains was the adoption, in July 1961, of the two rules in issue in this case (Pet. 7). These rules provided (*ibid.*):

> "No Active Member shall permit the publication of his shop name as a part of any list or directory of FTD florists a purpose of which is to encourage or influence Active Members appearing on said list or in said directory to exchange orders between themselves to the exclusion of other Active Members of FTD."; and
>
> "No Active Member shall advertise or hold out to the public in any manner with respect to flowers-by-wire orders that he offers an exclusive flowers-by-wire service, when other FTD members offer FTD service in the same area."

The text of these rules contains no prohibition against affiliation with or participation in petitioner's organization or any other. They permit listing in any directory of FTD members which does not promote a boycott of other FTD members. Additionally, the rules merely proscribe false advertising of an exclusive wire service, when other FTD members in the same area also provide such service.

In a sworn answer to an interrogatory, petitioner affirmed:

> "Plaintiff knows of no instances where FTD members refused to deal with or denied FTD services to FTD members who were members of plaintiff." (RA 49).

At trial Mr. O'Brien testified that the services of the FTD clearinghouse were available to his franchisees (P I 119).

On April 24, 1961 before the rules in issue were adopted, FTD's counsel submitted them to the Department of Justice for clearance. This submission was made in a five-page letter to Assistant Attorney General Loevinger, fully disclosing their background (RX 61, P III 78-82). Among other things, the letter stated (P III at 80):

> "... At the instance in one case of an FTD member and in other cases at the instance of persons outside FTD there have been formed or are proposed to be formed, groups of FTD members who are purportedly given 'exclusive franchises' within particular cities or areas. One obvious purpose of such groups is to limit the exchange of FTD orders between the franchised areas to members of the intramural group, to the exclusion of other FTD members in the area. One other purpose, obviously, is to profit the sponsor of the intramural group, who sells the 'exclusive franchise.'
>
> "... The Association itself suffers no loss of revenue, so its concern is not financial. Rather it is disturbed by the divisive consequences of this discrimination by some members against the others."

After setting out the full text of the rules (*id.* at 81), the letter then requested their clearance, as follows (*id.* at 82):

> "We hope that your department will agree with us that the proposed rules do not in any way conflict with the terms of the Final Judgment of June 1, 1956, *and that they are not contrary to any of the various statutes which you administer and enforce.*" (Emphasis supplied).

Six months later, on June 19, 1961 these same rules were cleared without qualification. The clearance from the Antitrust Division read (RX 62, P III 83):

> "In reply, I wish to advise you that the Antitrust Division of the Department of Justice *has no objection* to the proposed additions at the end of Membership Rules 1 and 3 or to the proposed addition of new Membership Rule 16. *Further,* the Division will take no action under the Final Judgment in opposition to said proposed amendments." (Emphasis supplied).

Later, in 1961, a mistaken interpretation of the rules was inadvertently sent to three FTD members. This led to a series of communications with the Department of Justice. These are reproduced in full in Respondent's Supplemental Appendix in the Court of Appeals (incorporated in its Reply Brief below as "DSA 1" *et seq.*). The upshot was that the Antitrust Division, on this occasion by Assistant Attorney General Orrick, reaffirmed its prior clearance—this time expressly approving FTD's circulation of the following interpretations of the rules (RX 79, Attachment 2, RX 80, DSA 16-18, emphasis supplied):

> "Interpretation: The names of FTD members or their shops may be listed in private or public directories in connection with their membership in organizations other than FTD. However, the FTD member may not permit publication of his name or shop name in a list or directory of FTD members, *a purpose of which directory is to encourage or influence such members to deal with each other through FTD facilities to the exclusion of other FTD members.*
>
> * * *

"Interpretation: FTD members may advertise their unique services which exceed or are different from those required by FTD membership. *However, in a town or locality where there are two or more FTD members, no FTD member may advertise his service as the exclusive flowers by wire service.*" [10] (Emphasis supplied).

The Jury Instructions and Verdict: The jury instructions comprehensively set forth petitioner's theory of its claims—quoting the allegations of the complaint at length *in haec verba.*[11] As the court below noted,

---

[10] It is true that the Department of Justice filed a memorandum below (Pet., 9 n. 8). Rather than comment on it, we incorporate our response as an Appendix to this Brief. See pp. 1a-3a, *infra.*

It is also true that the Department of Justice has filed a civil complaint against respondent (Pet. 9-10 n. 8). That complaint does not mention petitioner and its charges are unrelated to this case. The above-quoted clearances expressly covered the rules here at issue. That case has not been tried. Respondent has denied all allegations of unlawful conduct and will contest it. By its reference to that case, petitioner would prejudice respondent in this one.

[11] These were the quotations in full text (P II 458-60, inclusive):

"Now, the complaint in this matter insofar as it need be read at this time to you provides and charges that:

" 'For many years last past and continuing to the present date the defendant FTD and its co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in flowers-by-wire orders and to monopolize or attempt to monopolize for defendant FTD the hereinbefore described trade and commerce in render' g flowers-by-wire orders service to retail florists in violation of the sections of the Acts of Congress,'

"—which I shall read to you later.

" '—the said combination and conspiracy charged has consisted of a continuing agreement, understanding and concert of action by defendant FTD, its co-conspirators and others to plaintiff unknown, the substantial terms of which have

the jury received "no admonition that these allegations were mere accusations, not evidence." (371 F. 2d 263 at 270).

The instructions given said nothing whatever to the jury about possible consideration of the evidence of

---

been and are to cause FTD subscribing florists to cease and to refrain from doing business with and from using the flowers-by-wire order services and facilities provided by the plaintiff in order to eliminate plaintiff as a competitor and to destroy its business.

" 'For the purpose of carrying out the aforesaid combination and conspiracy defendant FTD,'

"—it is charged,

" '—together with its co-conspirators and others to plaintiff unknown have undertaken and done the things that they have combined and conspired to do and, among other things, they have,'

"it is alleged,

" '—(a) adopted, promulgated and threatened enforcement of an FTD membership rule, violation of which subjected the offending subscriber florist to suspension or revocation of his FTD membership, which rule was designed and intended to prevent FTD members, who also were subscribing florists of plaintiff, from advertising in the Yellow Pages of phone directories, or elsewhere their affiliation, exclusive or otherwise, with the plaintiff.

" '(b) Adopted, promulgated and threatened enforcement of an FTD membership rule, violation of which subjected the offending subscriber florist to suspension or revocation of FTD membership, designed and intended to prevent FTD members who were also subscribing florists of plaintiff from listing in plaintiff's membership directory and,

" '(c) advised FTD members that they may be subject to boycott or disciplinary action in the event such members became or continued as subscribing florists of plaintiff and otherwise acted to prevent and discourage FTD members from utilizing the services and facilities provided by the plaintiff.' "

petitioner's activities underlying the defense theory that the rules were reasonable and lawful in the circumstances surrounding their adoption. The trial court uniformly rejected every one of respondent's requested instructions—Nos. 18, 29, 29A[12]—which contained any specific or general reference to such evidence.

None of these rejected requests mentioned "unclean hands" or claimed that respondent was immune from liability, regardless of its conduct, if petitioner was guilty of misconduct. Their sole thrust was to obtain jury consideration of the defense theory that the rules were reasonable and lawful.

Request 18 reviewed respondent's analysis of the evidence supporting its position that the rules were reasonable. This was interspersed by repeated declarations that the analysis represented views of the evidence which respondent "claims," "alleges," or "asserts." It concluded as follows (Pet. 12, n. 13):

> "Defendant *asserts* that it acted at all times in good faith and took every *reasonable* precaution to assure the legality of its actions." (Emphasis supplied).

Request 29 was a limited version of 18. It would have authorized the jury to "consider" whether respondent, "in good faith, believed"[13] that petitioner was promoting a boycott of other FTD members and deceptive public advertising of an exclusive wire order service

> "[i]n considering whether these rules were specifically intended to drive the plaintiff out of business

---

[12] Pet. 11-12 n. 13.

[13] This language reflects *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918). See p. 20 *infra*.

> or were intended to be only a *reasonable* means to protect interstate trade and commerce in flowers-by-wire orders from destructive and injurious practices." (Pet. 12 n. 13; emphasis supplied).

Request 29A was general in form and would simply have permitted the jury, in deciding whether the challenged rules were "reasonable" to

> "consider all of the surrounding facts and circumstances of which FTD had knowledge or which FTD reasonably believed to exist." (*ibid.*)

The lengthy charge contained only a brief, abstract and confusing instruction about the possibility of defense (P II 467). This first said the

> "rules on their face, do not constitute unreasonable restraints of trade, regardless of [their] effect . . . upon the plaintiff."

But it then declared that trade associations

> "may not adopt means to protect themselves . . . from practices of competitors which are destructive and injurious, when the purpose *or direct affect (sic) thereof* is to force competitors out of business." (Emphasis supplied).[14]

---

[14] In full text, this instruction said *(ibid.)*:

> "The adoption and publication of the three membership rules in and of themselves, and those rules on their face, do not constitute unreasonable restraints of trade, regardless of what effect such adoption and publication, standing alone, might have had upon the plaintiff.
>
> "However, if the rules were adopted and published with the specific intent of destroying plaintiff's business, then that intent would convert the adoption and publication from lawful to unlawful acts. Trade associations may not adopt means to protect themselves and protect their interstate trade and commerce from practices of competitors which are destructive

This instruction excluded consideration of petitioner's "destructive and injurious" practices. It also restated, as law, the complaint's allegation—previously read to the jury as part of the charge—that respondent had adopted the rules "in order to eliminate plaintiff as a competitor and to destroy its business" (p. 14, n. 11, *supra;* P II 459).

Under such instructions the jury returned a verdict for petitioner, amounting to trebled damages of $450,000 (Pet. 3).

The Injunction Decision: The trial court, having heard the evidence, denied injunctive relief. He found that plaintiff had deliberately formulated and carried out a plan—dependent upon access to respondent's clearinghouse—which "utilized yellow page advertising listings" to deceive the public and "was a boycott against the members of Defendant's Association who were not affiliates of Plaintiff" (Pet., App. B, 38-40). His conclusion was as follows (*id.* at 39):

> "The rules adopted by Defendant Association were not such a restraint upon the activities of Plaintiff as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition within the same general industry, while protecting the integrity of its own service for the benefit of its own members."

The Decision of the Court of Appeals: The court below reversed the jury verdict on the sole ground that

---

and injurious, when the purpose or direct affect (sic) thereof is to force competitors out of business. At the same time, the antitrust laws do not prevent trade associations from adopting reasonable rules and regulations to protect their interstate trade and commerce from destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis."

respondent had been denied jury instructions concerning the theory of its defense. To quote the court (371 F. 2d 263 at 270).

> "A party is entitled to instructions presenting his theory of the case if there is evidence to support it. *Allers* v. *Bohmker,* 7 Cir., 199 F. 2d 790 . . . This would appear to be particularly so in the instant case where in contrast to the court's silence on the defendant's theory of defense it did give instructions which had the effect of fully covering the plaintiff's theory of liability and read pertinent extracts from the plaintiff's complaint to the jury, and although the court prefaced or interspersed them with the characterization 'it is alleged' or 'it is charged' it gave no admonition that these allegations were mere accusations, not evidence.
>
> "On the damage claim phase of the appeals we conclude that, on the facts and circumstances here presented, the court's refusal and failure to instruct the jury on FTD's theory of defense constitutes prejudicial error which requires reversal of the judgment for damages and a remand to the District Court for a new trial.

The court likewise reversed the judgment denying an injunction, on "res judicata and collateral estoppel" grounds, as follows (*id.* at 270-71):

> "FNTDN's complaint combined claims for damages and injunctive relief. In such case a trial of either claim before the other raises a collateral estoppel to the relitigation of those issues essential to the decision which are common to both claims and are decided in connection with the claim tried first. . . .
>
> "FNTDN having demanded a jury trial it was mandatory that the treble damages claim be tried and disposed of before consideration of the equit-

able claim for injunctive relief. The issue of the alleged violation of the Sherman Act was common to both claims. And to proceed otherwise might, through operation 'either by way of res judicata or collateral estoppel' deprive FNTDN of its right to a jury trial on its treble damages claim. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500."

The Court remanded the case for a new trial on both the damage and the injunction issues, stating (*id.* at 271):

"Thus, although our reversal and remand for a new trial voids the jury's verdict, and FTD is entitled to a new trial on the damages claim made against it, FNTDN, under the circumstances is entitled to a redetermination of its claim for injunctive relief subject, of course, to any estoppel which on retrial may flow from the jury's determination of the issues which are common to both claims." [15]

REASONS FOR DENYING THE WRIT

1. *There is no question of general importance; only the limited issue of the proper jury instructions on the evidence in this particular case.* The decision below held that the trial "court's refusal and failure to instruct the jury on FTD's theory of defense constitutes prejudicial error." (371 F. 2d 263 at 270). In so holding the court perceived that respondent had been improperly denied jury consideration of the legality of its rules under the governing standards prescribed by this Court. Those standards dictated appraisal of the purpose and nature of the rules in light of all the sur-

[15] Respondent intends to file a conditional cross-petition for a writ of certiorari from the reversal of the injunction judgment below and has been granted until April 10, 1967 to do so.

rounding circumstances, under the "rule of reason" doctrine taught by a long line of decisions from *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231, 238 (1918) through *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 623 (1953), and *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963).

Respondent's refused instructions—tailored along the classic lines of *Board of Trade, supra*—were designed solely to permit jury evaluation of the reasonableness of respondent's rules in light of the circumstances leading to their adoption.[16] Each left the jury free to determine the reasonableness issue against respondent, even if it found that respondent's rules were a defensive response to petitioner's aggressions.

As the court below concluded, the refusal of such instructions foreclosed jury evaluation of undeniably "relevant facts," contrary to the time-honored mandate of this Court—originally pronounced in *Board of Trade, supra,* 246 U.S. at 238, and reaffirmed in *White Motor, supra,* 372 U.S. at 261—which declares:

> "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, *are all relevant facts.*" (Emphasis supplied).[17]

The result exposed respondent to jury consideration of its rules in a vacuum, independently of petitioner's previously implemented program—of boycott and misrepresentation—to subvert respondent's facilities for the advantage of its small clique of FTD mem-

---

[16] Pet. 11-12 n. 13; see pp. 15-16, *supra.*

[17] 371 F. 2d 263 at 268.

bers, through an "inside" operation grounded on their access to the FTD clearinghouse and its guaranty of accounts. Correlatively, petitioner was allowed to pose before the jury as an innocent bystander, victimized by rules unrelated to its premeditated assault on other FTD members.[18]

There is no authority which dictates such blindfolding of a jury.

2. *There is no conflict with decisions of this Court.* Petitioner is misguided in its reliance upon *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211 (1951), and other authorities holding that a defendant guilty of violating the antitrust laws cannot escape liability by pointing to petitioner's misconduct.

Contrary to petitioner's claim, respondent's requested instructions in no manner "detailed defendant's 'unclean hands' theory of defense" (Pet. 11). None of the requests mentioned "unclean hands." None sought a charge that "illegal conduct of petitioner" would "legalize," respondent's conduct or "im-

---

[18] The prejudice to respondent was accentuated—not ameliorated—by the lone instruction recognizing any possibility of defense. See pp. 16-17, *supra*. The charge was the last thing heard by the jury. It was doubly injurious to respondent. First, the totally abstract quality of the single "defense" instruction necessarily conveyed the impression that respondent's preceding evidence and arguments concerning petitioner's conduct were meaningless—particularly in light of the lengthy quotations from the complaint. See pp. 13-14 n. 10, *supra*.

Next, the charge was contradictory. In one breath it declared that the rules were not "on their face . . . unreasonable restraints . . . regardless of [their] effect . . . upon the plaintiff." In the next breath it said that even if adopted as protection from "destructive" practices, the rules were bad if the "purpose *or direct affect* (sic) *thereof* was to force competitors out of business." (Emphasis supplied). See pp. 16-17, *supra*.

munize [it] against liability." *Kiefer-Stewart, supra,* 340 U.S. at 214. (See Pet. 11-12, n. 13).

Petitioner—not respondent—has consistently raised the "unclean hands" concept in this case. By repeated and distorted invocation of *Kiefer-Stewart*—as a sword for a plaintiff—petitioner has persistently attempted to foreclose any consideration of its antecedent conduct by the jury, the trial court, the Court of Appeals [19] and by this Court [20] in adjudicating the reasonableness of the challenged rules. Respondent's appeal from the jury verdict was based solely on the erroneous refusal of all of its requested jury instructions on the defense theory that the rules were reasonable and lawful (ROB 30-37).[21]

The content of the rules, moreover, undercuts petitioner's reliance on cases rejecting a plaintiff's misconduct as a ground for immunizing antitrust defendants. Each such case reached this Court on a record

---

[19] At the trial stage petitioner successfully used this technique to beat off every requested instruction containing any mention of its conduct (Tr. 2504-07). At the appellate stage, petitioner first cited *Kiefer-Stewart* in support of its claim that the trial court improperly considered its activities in deciding that respondent's rules were reasonable and therefore denying injunctive relief (POB 49). Petitioner then used the case again in its answer brief to the appeal from the jury verdict, to support the argument that the refused instructions were improper because they mentioned its conduct (PAB 24).

[20] Compare footnote 1 at page 3 of the Petition with the full text of the purportedly quoted section of the opinion. 371 F. 2d 263 at 267.

[21] Under the briefing sequence ordered by the court below, petitioner filed the first brief, appealing from the denial of injunction (POB), and respondent the second brief, appealing from the jury verdict and answering petitioner's first brief on the injunction appeal (ROB).

establishing a *per se* antitrust violation by the defendant. There was price-fixing in *Kiefer-Stewart, supra;* boycott in *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457 (1941); and price discrimination, specifically prohibited by the Robinson-Patman Act, in *Moore* v. *Mead Service Co.,* 340 U.S. 944 (1951), on remand 190 F. 2d 540 (10th Cir. 1951), cert. denied 342 U.S. 902 (1952).[22]

In contrast, this case involves two rules which are not *per se* antitrust violations under judicial precedent or forbidden by specific statutory mandate. This is self-evident from their clearance—both before and after promulgation—by the Antitrust Division of the Department of Justice, acting with full knowledge of their background and purpose. See pp. 11-12, *supra.* The sum and substance of these rules were simply anti-boycott and honest advertising specifications.[23]

Nothing in the rules prevented any FTD member from joining petitioner's organization or any other, or from participating in their activities. They did not prohibit service to petitioner's members.[24] They allowed FTD members to be listed in petitioner's direc-

---

[22] Petitioner itself recognized that a *per se* violation was crucial to these decisions. In its original brief below—appealing from the injunction judgment—petitioner made no suggestion that respondent's rules were *per se* illegal (POB 49). But in its answer to respondent's appeal from the jury verdict, it was compulsively driven to the following primary argument: "THE EVIDENCE ESTABLISHED A PER SE ANTITRUST VIOLATION" (PAB 16).

[23] The full text of the rules appears at p. 10, *supra.*

[24] The trial court found that no FTD member was ever disciplined for joining petitioner (Pet App. B, p. 33, ¶ 4). Petitioner has never suggested otherwise. (POB 56-57). Petitioner admitted that no order between its members had ever been denied the service of respondent's clearinghouse. See p. 10, *supra.*

tory if it abjured promotion of a boycott of other FTD members. Their only other prescription was a ban against deceptive advertising of an exclusive service—applicable to all FTD members, whether or not they belonged to petitioner's organization.

3. *There is no conflict of Circuits.* The decision below involves no conflict with other Circuits. It followed the most closely parallel Court of Appeals case. *Union Leader Corporation* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961), rehearing denied, 365 U.S. 890 (1961). As the Court below perceived (371 F. 2d 263 at 267-68), that case squarely rejected, as follows, the same propositions pressed by this petitioner (284 F. 2d at 586-87):

> "In calling [defendant's conduct] an 'unfair practice' *the court assumed the point.* For, as we conceive the issue, the practice was 'unfair' if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by Union Leader's unlawful activities." (Emphasis supplied).
>
> "It is now clear that a plaintiff's own antitrust violations do not bar its successful maintenance of a private anti-trust action. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 1951, 340 U.S. 211, 71 S. Ct. 259, 95 L.Ed. 219, rehearing denied 340 U.S. 939, 71 S. Ct. 487, 95 L.Ed. 678; *Moore* v. *Mead Service Co.*, 10 Cir., 1951, 190 F. 2d 540, certiorari denied 342 U.S. 902, 72 S. Ct. 290, 96 L.Ed. 675. Nor can the use of unfair methods by a competitor automatically justify adopting comparable unfair methods. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L.Ed. 1338. However, *it does not necessarily follow that a competitor's violations cannot constitute a cir-*

> *cumstance to be considered in determining whether the defendant's conduct was in fact a violation.* (Emphasis supplied).

Union Leader expressly followed this Court's teaching in *Times-Picayune Publishing Company* v. *United States,* 345 U.S. 594, 623 (1953).[25] The Courts of Appeals in this case and in *Union Leader* are in strict accord. The net of the decision below is that respondent was entitled to instructions allowing evidence of petitioner's abuse of respondent's membership and facilities

> "to be considered in determining whether the defendant's conduct was in fact a violation." (*Union Leader, supra,* at 586).

The Petition presents no issues of such a kind warranting review by this Court.[26]

4. *There are no circumstances warranting this Court's interlocutory consideration of the case, "contrary to its usual practice." Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964).[27] The plea for interlocutory consideration asks peremptory denial by this Court of respondent's right to a jury trial on proper instructions. Petitioner admits that respondent was not responsible for the trial delays (Pet. 18 n. 17). Respondent is a non-profit corporation serving

---

[25] 284 F. 2d at 587.

[26] The present petition rests on the identical grounds and authorities unsuccessfully urged in support of a writ in *Union Leader*. Compare Petition No. 658, October Term, 1960, at pp. 15-18, with the present petition at pp. 13-15.

[27] See also, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-58 (1916); *American Construction Company* v. *Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

a membership overwhelmingly composed of far smaller businessmen than petitioner's president. See p. 3 n. 2, pp. 4-5, *supra*. They can ill afford the huge verdict erroneously entered below.

A second trial will be properly submitted to the jury under respondent's requested instructions which simply seek an adjudication of the case under the applicable "rule of reason" standards.[28]

CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN DIAMOND
1229 - 19th Street, N.W.
Washington, D. C. 20036

MELVILLE C. WILLIAMS
69 W. Washington Street
Chicago, Illinois 60602

---

[28] Petitioner is misguided in its invocation of *United States* v. *General Motors Corporation*, 323 U.S. 373 (1945). That case involved the litigation of a novel question for which there was no trial guideline. To quote the Court (*id.*, at 374):

> "This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict."

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 15719 and 15720

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK AMERICA'S PHONE-ORDER FLORISTS, INC., a corporation, *Plaintiff-Appellant,* (Cross Appellee)

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation, *Defendant-Appellee,* (Cross Appellant).

Defendant-Appellee's Response to Memorandum of the United States

This case has been in litigation five years. It has been concerned solely with the propriety of three rules adopted by the defendant Association, following their submission to—and advance clearance by—the Antitrust Division of the Department of Justice.

On the eve of oral argument in this Court, the United States, for the first time, has seen fit to express itself concerning its prior action on those rules—by a memorandum mailed to the Court and the parties on November 23, 1966. However, we welcome this belated submission of the United States.

The substance of the Government's memorandum is a mere quibble whether the Antitrust Division's unqualified statement that the rules were unobjectionable constituted "an 'approval' of the rules." This is a matter of semantics. There is no suggestion that the Antitrust Division disputes its "*clearance*" of the rules.

In fact, the Government's memorandum corroborates conclusively the fact that Defendant-Appellee submitted the rules for advance "clearance" by the United States (D. Br., Supp. I at p. 54). It likewise confirms the facts

that the Antitrust Division—with full notice of the content of those rules—categorically advised it "ha[d] no objections" to them; further stated that it would "take no action under" the previously entered consent decree, "in opposition to" those rules; and additionally expressed its "trust" that the clearance "will be of assistance" to the defendant Association.

In sum, the effect of the Government's belated memorandum is to eliminate any possible controversy concerning FTD's good faith reliance on the Government's assurances before it adopted the rules in question and the Government's unequivocal "clearance" of those rules.

Unless a private citizen is entitled to rely on such a clearance, what function does the clearance procedure serve? Unless such reliance is permissible, the clearance procedure becomes a trap for the well-meaning citizen who invokes the Government's advice. As this Court has recognized, when "[T]he United States has given its word, it should . . . keep it" *F.T.C.* v. *Dilger*, 276 F. 2d 739, 744 (7th Cir. 1960); cert. denied 364 U.S. 882 (1960).

Indeed, this 11th-hour memorandum of the United States highlights the irony of this whole case. The long and short of it is that defendant Association has been sued here for its good faith reliance on the Government's advice. The record is clear that the rules would never have been promulgated if the Government had disapproved them (Pl. App. Vol. I, 148, 153 and Vol. II, 369, 416). The submission of the rules to the Antitrust Division attests to the Association's good faith in adopting them.

We note further that the Government's memorandum is mistaken in its present representation—to this Court—that the Antitrust Division's consideration of the rules was made only

> "for the purpose of determining whether it should object to them under the consent decree."

This is not so. In submitting the rules—in full text—for "clearance" by the Antitrust Division, defendant Association's counsel stated (D. Br., Supp. I, at p. 54):

> "We hope that your department will agree with us that the proposed rules do not in any way conflict with the terms of the Final Judgment of June 1, 1956, *and that they are not contrary to any of the various statutes which you administer and enforce.*" (Emphasis supplied)

The Antitrust Division's response discloses full appreciation of the scope of the request and the scope of the resultant clearance. The Government's response stated (D. Br., p. 11):

> "In reply, I wish to advise you that the Antitrust Division of the Department of Justice *has no objection* to the proposed additions at the end of Membership Rules 1 and 3 or to the proposed addition of new Membership Rule 16. *Further,* the Division will take no action under the Final Judgment in opposition to said proposed amendments." (Emphasis supplied)

The truth of the matter is that the Government's description of itself as an *amicus curiae* is misleading. The Government is not a disinterested party. As the plaintiff noted in its answer brief (p. 9), in a transparent effort to prejudice defendant, the United States has a recently-filed untried complaint against this same defendant pending in the United States District Court in Detroit. The Government memorandum—as purported *amicus curiae*—is an equally transparent attempt to induce this Court to prejudice the defense of the Detroit action.

Finally, regarding the full disclosure which accompanied the submission of the rules for clearance by the Antitrust Division, we again invite the Court to read the letter of FTD's counsel to the Assistant Attorney General, Antitrust Division. (This appears in full at pp. 50-54, inclusive, of Defendant-Appellee's original brief and argument.)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1132

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK-AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Petitioner,

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Petitioner.

Of Counsel:
MCCONNELL, FREEMAN, CURTIS & MCCONNELL,
134 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

INDEX.

	PAGE
The Challenged Rules Constituted a Concerted Refusal to Deal	1
The Opinion Below Holds That Unclean Hands Is a Defense	7
Respondent's Fact Statement Distorts the Record	8
Conclusion	11
Appendix—America's Phone Order Florists "Yellow Page" Advertisement	1a
F. N. T. D. N. "Yellow Page" Advertisement	1b

CITATIONS.

Anderson v. Shipowners Asso., 272 U. S. 359 2
Associated Press v. United States, 326 U. S. 1 ..... 2, 4
Board of Trade of the City of Chicago v. United States, 246 U. S. 231 ..... 1, 5
Crest Auto Supplies, Inc. v. Ero Manuacturing Co., 360 F. 2d 896 ..... 7, 8
Eastern States Retail Lumber Asso. v. United States, 234 U. S. 600 3
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 ..... 6, 7, 8
Klors v. Broadway-Hale Stores, 359 U. S. 207 2
Silver v. New York Stock Exchange, 373 U. S. 341 2
Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 6
Times-Picayune Pub. Co. v. United States, 345 U. S. 594 5
Union Leader Corp. v. Newspapers of New England, Inc., 284 F. 2d 582 5
United States v. National Asso. R. E. B., 339 U. S. 485 3
United States v. Socony-Vacuum, 310 U. S. 150 5
United States v. Trenton Potteries Co., 273 U. S. 392 .. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1132.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK-AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Petitioner,

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

I. THE CHALLENGED RULES CONSTITUTED A CONCERTED REFUSAL TO DEAL.

(Reply to pp. 19-21 of Brief in Opposition.)

Respondent presents a twofold argument in support of the decision below: first, that under Section 1 of the Sherman Act the legality of the challenged membership rules depends upon application of the "rule of reason"; and second, that under *Board of Trade*[1] the jury should have been instructed to take into account petitioner's alleged unfair trade practices in determining the "reasonableness"

---

1. *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231.

of the membership rule restraint (Br. 19-21). Respondent no longer suggests that its unfair trade practices defense "if established" would "bar FNTDN from both recovery of damages and injunctive relief" (Pet. App. B, p. 28). It now disclaims responsibility for that decision by the court below (Br. 21-2).

The answer to respondent's rule of reason argument is that this is a concerted refusal to deal case. We know of no decision which holds that there can be a "reasonable" concerted refusal to deal. As this Court emphasized in *Klors* v. *Broadway-Hale Stores,* 359 U. S. 207, 212: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances. . . .". Even respondent concedes that it "cannot escape liability [for a *per se* violation] by pointing to petitioner's misconduct" (Br. 21).

The concerted refusal to deal can be quickly demonstrated. FTD is by definition an association of retail florists or independent businesses. The form of association is no different than in *Associated Press.*[2] Each member upon admission to membership "surrender[s] himself completely to the control of the association" (*Anderson* v. *Shipowners Asso.,* 272 U. S. 359, 362) and agrees to abide by FTD's by-laws and all rules adopted by the FTD board. Violation of any rule is ground for expulsion (Ex. R. 3). "The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with [FTD's rules] upon being admitted to membership rather than when [the rules were adopted] does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur" (*Silver* v. *New York Stock Exchange,* 373 U. S. 341, 348, n. 5).

2. *Associated Press* v. *United States,* 326 U. S. 1, 3-4.

As the court below concedes (Pet. App. B, p. 27) following announcement of the rules virtually all of petitioner's subscribers either immediately resigned or let their franchises lapse at the first renewal date. Petitioner experienced a 97% rejection rate after announcement of the challenged rules (Ex. R. 70). Within a matter of months its organization was riddled. It is difficult to imagine more conclusive evidence of a concerted refusal to deal.

Typical of the resignation letters were the following:

> "In accordance with the FTD Newsletter of July 17, 1961, we ask that you remove our shop name from the Roster of Members of America's Phone-Order Florists, Inc. Also do not renew the telephone 'yellow page' ads carried in the Lafayette directory for the coming year" (McKinney's Flowers, July 17, 1961, Ex. R. 19).
>
> " In accordance with a directive received today from FTD we are notifying you as attorneys for Jane's Flowers . . . to terminate her membership with you, and that the above names be removed from your roster, the same effective immediately" (Jane's Flowers, July 18, 1961, Ex. R. 16).
>
> "Please take my name off the membership list at once. As you probably know FTD has passed a rule against this and I don't want to jeopardize my FTD membership. Please don't delay" (Sorenson's Floral Shop, August 2, 1961, Ex. R. 17).
>
> "In the face of what FTD office has ruled as being put out of membership, I don't see how anyone can continue in your organization. So I am hereby submitting my resignation from F.N.T.D.N. Sorry it had to end up that way . . ." (Arthur Crabb Flowers, September 14, 1961, Ex. R. 18).[3]

---

3. Respondent notes that no FTD member was ever disciplined under the rules for joining petitioner or using its services (Br. 23, n. 24). There was no need for such disciplinary action because of the immediate voluntary compliance with the rules. Nor was it necessary to show that formal sanctions were imposed. See *United States* v. *National Asso. R.E.B.*, 339 U. S. 485, 489; *Eastern States Retail Lumber Asso.* v. *United States*, 234 U. S. 600, 608-9.

In *Associated Press* this Court declared, "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in any common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the group compete" and "arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose" (326 U. S., at pp. 15, 19). Here the rank and file FTD membership complained that petitioner's directory and yellow page advertising made FNTDN's subscribers the target for additional wire order business (R. 192-3, 265-6; Ex. R. 30-4). It was this competition for additional business which FTD "stifled" for the sake of preserving harmony among the members of the association. It was accomplished through a "membership device" which forbade use of petitioner's services.

The liability issue in this case could have been decided by summary judgment as in *Associated Press* had the challenged FTD rules flatly prohibited use of petitioner's services. However, the rules could not be so phrased because this would have been an obvious violation of the consent decree.[4] It therefore was necessary to establish that the rules in fact were aimed at petitioner and were intended to

4. Respondent's argument (Br. 11-13) that the rules were "twice cleared" by the antitrust division of the Department of Justice is answered fully in the government's *amicus* brief filed in the court below and transmitted with the petition (see Pet. pp. 9-10, n. 8). It should be noted that FTD's "cover" letter to Justice made no mention of petitioner and did not disclose, as the evidence showed, that the rules were "aimed at" petitioner (R. 227-8; Ex. R. 49, 50), that they were "intended to block the network" (R. 98-102), and that they were "expressly intended to stop FTD members from joining the organization that is now suing FTD" (R. 353-6). When petitioner complained that the rules were intended to prevent use of its directory and yellow page services, Justice wrote FTD, "to the extent that this has been and continues to be your reading of these rules, the rules in practice do not, in our opinion, comply with [the consent decree]" (Ex. R. 85).

prevent FTD members from using petitioner's directory and yellow page services and that the membership so understood them. The evidence on this score was so conclusive that respondent's counsel conceded the fact at the trial and again in the court below. He said, "We make no bones about it" (R. 180). Having established the purpose and meaning of the rules, it was as if they had in actual text read:

> "No FTD member shall permit the publication of his shop name in the FNTDN directory;

and

> "No FTD member shall advertise or hold out to the public in any manner that he is the exclusive representative of FNTDN or permit his shop name to appear in FNTDN's yellow page advertisements."

The adoption of such trade association membership rules finds no sanction in this Court's *Board of Trade* decision. This is not a case of internal regulation designed to promote competition;[5] the rules were externally directed and intended to prevent use of petitioner's services.[6] The group boycott thereby effected cannot be justified by a claim of good intention, whether expressed in terms of "self-protection" (Pet. App. B, p. 28) or "a defensive response to

---

5. See discussions of *Board of Trade* in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 401, and *United States* v. *Socony-Vacuum*, 310 U. S. 150, 217.

6. Neither *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, nor *Union Leader Corp.* v. *Newspapers of New England, Inc.* (1st Cir.), 284 F. 2d 582, suggests that a plaintiff's unlawful trade practice is a relevant consideration in a concerted refusal to deal case under Section 1 of the Sherman Act. These cases were concerned with individual rather than concerted conduct and as this Court declared, "Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [citations] different criteria have long applied to qualify the rights of an individual seller" (345 U. S. 624). In the present case respondent's tendered instructions concerning petitioner's alleged unfair practices were offered to justify as reasonable under Section 1 the concerted refusal to deal accomplished through the membership rule restraint.

petitioner's aggressions" (Br. 20). "Nor can [the antitrust laws] be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

Since the evidence established a concerted refusal to deal, the conflict with *Kiefer-Stewart* (340 U. S. 211) cannot be avoided by saying this is a non *per se* case. But even if the rule of reason had been applicable, the jury was here instructed that the rules would be unlawful only if they "were adopted and published with the *specific* intent of destroying plaintiff's business" (R. 467).[7] Respondent has never contended that the evidence was insufficient to support a verdict for petitioner under this instruction. The decisions of this Court certainly do not suggest that "self-protection" or a "defensive response" can justify as reasonable the intended destruction of a competitor. There is no place for such economic vigilantism under the antitrust laws.

---

7. While respondent now criticizes this instruction in full text as contradictory and abstract (Br. 16), the fact remains that the instruction was drafted and tendered by respondent's counsel and given over petitioner's objection (App. 7A attached to petitioner's answer brief below).

Respondent similarly criticizes the District Court for reading to the jury from petitioner's complaint but once again respondent made no objection to this procedure which was followed in lieu of giving a special instruction on the issues made by the pleadings (*Ibid.,* pp. 7A-9A).

II. THE OPINION BELOW HOLDS THAT UNCLEAN HANDS IS A DEFENSE.

(Reply to pp. 21-24 of Brief in Opposition.)

Despite the clear and unambiguous language in the opinion, respondent argues that the court below did not hold that the defense of "unclean hands" if established would bar petitioner from recovery. Respondent asserts that the court merely held that respondent's refused instructions should have been given and that none of these instructions mentioned "unclean hands" as a defense (Br. 21-4).

The difficulty with this argument is that the opinion of the Court of Appeals is not so limited. The opinion states, "The core of FTD's *defense*" is that "FNTDN's purpose and conduct [the alleged boycott and misleading advertising] *preclude* it from recovery on the damage claim and bar it from equitable relief under the *'clean hands' doctrine.* Such defense, if established, would so *bar* FNTDN from both recovery of damages and injunctive relief" (Pet. App. B, p. 28).

The court then sought to distinguish *Kiefer-Stewart* and "similar decisions" on the ground that the "*'unclean hands' defense here asserted* does not relate to a transaction or subject matter other than the one in suit" (Pet. App. B, p. 29). The court also referred to its earlier decision in *Crest Auto Supplies* (360 F. 2d 896, 900), as exemplifying "an application of the *'clean hands'* doctrine which is pertinent here" (Pet. App. B, p. 29).

Equally disingenuous is FTD's disclaimer of responsibility for the decision below (Br. 21-2). Respondent unequivocally argued that "illegal methods" such as "boycott" and "'fraudulent and deceitful' palming-off" constituted a defense to this action.[8] Respondent declared

8. Respondent's initial brief below, pp. 23-4.

that upon proof of such illegal methods "[i]n this case it therefore follows that plaintiff's illegal conduct '*precludes recovery*' (*Ero Mfg.*, 360 F. 2d 900)."[9]

Respondent was also responsible for the purported distinction of *Kiefer-Stewart*. FTD advised the court below, "In sum, both plaintiff's misconduct and defendant's defensive rules were concerned with the 'same transactions'—the distribution and processing of inter-city flowers-by-wire orders by FTD members via the FTD clearinghouse. As this Court held in *Ero Mfg. Co.* (360 F. 2d 896), therefore, *Kiefer-Stewart* (340 U. S. 211) has no application here.".[10]

Respondent now abandons the legal argument which caused error in the decision of the Court of Appeals. While the respondent may attempt to support the decision on alternative grounds, we submit that it is precluded from suggesting that the decision stands for some proposition other than the one advanced in its own brief and adopted by the court below.

III. RESPONDENT'S FACT STATEMENT DISTORTS THE RECORD.

(Reply to pp. 1-19 of Brief in Opposition).

Respondent devotes 19 pages of its brief in opposition to what is essentially a reargument of fact contentions which the jury by its verdict saw fit to reject. We appreciate that the merits of petitioner's practices are not before the Court on this petition. However, respondent's statement gives such a distorted picture of the evidence that some comment appears in order.

The Alleged Boycott. There was not a scintilla of evidence that subscribers of petitioner were boycotting other FTD florists in the exchange of intercity floral orders.

9. *Ibid.*, p. 24.

10. *Ibid.*, p. 26.

If such a boycott were being practiced this fact could have been conclusively established by FTD's own clearinghouse records since all orders exchanged between subscribers of petitioner had to be reported to and cleared through the FTD clearinghouse (Ex. R. 35-6).[11] FTD's general manager Bodette admitted on cross-examination that he had no evidence of a boycott by petitioner's subscribers of other FTD members but that the clearinghouse records, if anything, indicated that just the converse was true (R. 224-5; Ex. R. 48).

Petitioner's president O'Brien testified that he encouraged FNTDN subscribers to use its directory but categorically denied that such use was in any way required or that FNTDN had sought to enforce a mutual exchange of intercity orders (R. 178-9). He explained that the directory was one of the services provided by the petitioner; that it listed only leading florists and was a more reliable directory than any other on the market (R. 178). O'Brien further testified that he told subscribers they were free to exchange orders with whomever they pleased (R. 181-2). O'Brien's testimony was fully corroborated by florists who had used petitioner's services (R. 142).

The evidence fairly showed that petitioner was doing no more and no less than selling a service which it represented to be superior to anything on the market.

The Alleged Misleading Advertising. Petitioner's yellow page advertisements were introduced in evidence and, for

11. The FTD mandatory clearinghouse rule provided, "All orders received by any Active Member from any other Active Member . . . shall be reported to and cleared through the Clearing House of this Association" (Ex. R. 7). This rule required FTD members who were dual members in other wire organizations, including petitioner's, to use the FTD clearinghouse when exchanging wire orders with other FTD members (Ex. R. 35-6). Teleflora and Florafax had few dual members (Br. 4) and therefore could afford to establish separate clearing facilities. Such growth as they experienced occurred during the pendency of this action (R. 116-8; Br. 4).

the Court's convenience, are reproduced as an appendix to this reply. These advertisements can be searched in vain for any reference to FTD. They do not say or imply that petitioner's representative is the only florist offering a flowers-by-wire service in the particular city; nor do they say or imply that petitioner's representative is the preferred FTD florist in the city. They merely state that the named florist is the exclusive representative of *petitioner* (R. 420-1).

As to the claimed similarity between half of petitioner's compound name and FTD's name, it hardly requires mention that FTD has no proprietary interest in the words "florists" or "delivery", and that both words were reasonably descriptive of petitioner's organization. Moreover, petitioner's name is a registered service mark.[12] Had respondent really believed that the two names were confusingly similar it undoubtedly would have petitioned to cancel petitioner's mark. This was never done, presumably on advice of legal counsel. In answer to Bodette's inquiry whether there was any merit to such a claim, FTD's counsel wrote that he could find no element of affirmative misrepresentation in petitioner's name and advertisements and "I am unable to see any basis upon which [FTD florists] would be entitled to relief" (Ex. R. 35-6).

12. Petitioner's mark was registered on January 12, 1960 (No. 691088) under the provisions of Title 15 U. S. C. § 1053, *et seq.*

Conclusion.

For the reasons stated in the petition and this reply brief, petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Petitioner.

Of Counsel:
McCONNELL, FREEMAN, CURTIS
& McCONNELL,
134 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

AMERICA'S PHONE-ORDER Fflorists

To send flowers anywhere call
FLORISTS' NATIONWIDE
TELEPHONE DELIVERY
NETWORK
(No Charge Account Needed)
Just ORDER-BY-PHONE —
PAY-BY-MAIL! Deliveries -
Everywhere - Everyday - "Phonaflower"

"TO ORDER CALL"

Exclusive Representative
Your Name
Address . . . . . Phone No. . .

Postmark
FILED
MAY 16 1963
O'CLOCK
ROBERT A. WAGNER
FOR IDENTIFICATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Plaintiff's Exhibit No. 5

APPENDIX.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK

To send flowers anywhere call
AMERICA'S PHONE-
ORDER FLORISTS
(No Charge Account Needed)
Just ORDER-BY-PHONE —
PAY-BY-MAIL! Deliveries -
Everywhere - Everyday - "Phonaflower"

"TO ORDER CALL"

Exclusive Representative
Your Name
Address . . . . . Phone No. . .

FILED
MAY 16 1963
O'CLOCK
A. WAGNER
PX GX DX
FOR IDENTIFICATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
HON. JAMES B. PARSONS, JUDGE

APR 10 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1248

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, a corporation, *Petitioner*,

v.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., a corporation, *Respondents*.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NORMAN DIAMOND
1229 19th Street, N.W.
Washington, D. C. 20036

MELVILLE C. WILLIAMS
69 W. Washington Street
Chicago, Illinois 60602

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
The Nature of the Case	3
The Decisions Below	3
(a) The Trial Court	3
(b) The Court of Appeals	4
Reasons for Granting the Writ, if a Writ Is Granted in No. 1132	5
Conclusion	9

LIST OF CITATIONS

CASES:

Atlas Life Insurance Company v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939)	6
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500, 508-09 (1959)	4, 7, 8
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 (1949), *cert. granted sub nom. McComb* v. *Farmers Reservoir & Irrigation Co.*, 335 U.S. 809, (1948)	5
Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc. v. *Florists' Telegraph Delivery Association*, 371 F.2d 263, 270, 271 (7th Cir. 1967)	2, 4, 5, 6, 7
Lawlor v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955)	7
Stainback v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949)	6
United States v. *Yellow Cab Company*, 340 U.S. 543, 555-56 (1951)	7, 8

STATUTES: Page

28 U.S.C. § 1254(1) 2

Clayton Act, Section 16, 15 U.S.C. § 26 .....2, 3, 5, 6, 7, 8

Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 ... 7

Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1 and 2 .. 3, 4

MISCELLANEOUS:

Brief in Opposition on the Petition for a Writ of Certiorari in *Florists' Nationwide Telephone Delivery Network — America's Phone-Order Florists* v. *Florists' Telegraph Delivery Association,* No. 1132 at the 1966 Term 3, 5

Conditional cross-petition for a writ of certiorari, *McComb* v. *Farmers Reservoir & Irrigation Company,* No. 196 at the 1948 Term 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION,
a corporation, *Petitioner,*

v.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., a corporation, *Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Florists' Telegraph Delivery Association, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit reversing the trial judge's denial of injunctive relief in a private antitrust action, the writ to issue only in the event this Court should grant

the petition for a writ of certiorari in No. 1132, at this Term, to review the same court's reversal of a jury verdict for respondent.

OPINIONS BELOW

The findings of fact and conclusions of the district court denying an injunction are not reported. They are reprinted in Appendix B of the petition in No. 1132, at 38-40. The opinion of the court of appeals is reported at 371 F.2d 263.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When jury trial is demanded by a private antitrust complaint combining claims for monetary and injunctive relief and both claims are tried simultaneously, is the trial court estopped by the jury verdict from making an independent determination of the alleged antitrust violation for purposes of the equitable claim?

STATUTE INVOLVED

The statute involved is Section 16 of the Clayton Act, 15 U.S.C. § 26, which provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust

[1] By order of Mr. Justice Clark, entered March 29, 1967, the time for filing this petition was extended to and including April 10, 1967.

laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, . . .".

STATEMENT

The Nature of the Case

This case involves a private action under Sections 1 and 2 of the Sherman Act, claiming damages and an injunction. Both claims were tried simultaneously. The facts of the case are set out in detail in the Brief in Opposition On the Petition for a Writ of Certiorari in *Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists* v. *Florists' Telegraph Delivery Association,* No. 1132 at this Term.

In brief, the issues concern the legality of two rules adopted by this petitioner—a non-profit membership corporation comprised of retail florists—prescribing anti-boycott and honest advertising standards of conduct for its members.

The Decisions Below

(a) *The Trial Court:* The damage and equity claims were tried simultaneously. Under a jury charge which this petitioner (and the court below) deemed prejudicial, for erroneous failure to instruct on the defense theory, the jury returned a verdict in respondent's favor, amounting to $450,000 trebled. Judgment was accordingly entered for respondent on February 15, 1966.

On February 25, 1966, the court entered its findings of fact and conclusions of law, sustaining petitioner's rules as reasonable under the antitrust laws,

and a judgment denying an injunction. (Pet. No. 1132, 1966 Term App. B, at 38-40).

(b) *The Court of Appeals:* The court below reversed the jury verdict on the ground that respondent had been prejudicially denied jury instructions concerning the theory of its defense. (371 F.2d at 270).

The court likewise reversed the judgment denying an injunction, on "res judicata or collateral estoppel" grounds, as follows (*id.* at 270-71):

> "FNTDN's complaint combined claims for damages and injunctive relief. In such case a trial of either claim before the other raises a collateral estoppel to the relitigation of those issues essential to the decision which are common to both claims and are decided in connection with the claim tried first. . . .
>
> "FNTDN having demanded a jury trial it was mandatory that the treble damages claim be tried and disposed of before consideration of the equitable claim for injunctive relief. The issue of the alleged violation of the Sherman Act was common to both claims. And to proceed otherwise might, through operation 'either by way of res judicata or collateral estoppel' deprive FNTDN of its right to a jury trial on its treble damages claim. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500."

The court remanded the case for a new trial on both the damage and the injunction issues, stating (*id.* at 271):

> "Thus, although our reversal and remand for a new trial voids the jury's verdict, and FTD is entitled to a new trial on the damages claim made against it, FNTDN, under the circumstances is entitled to a redetermination of its claim for injunctive relief subject, of course, to any estoppel which on retrial may flow from the jury's determ-

nation of the issues which are common to both claims."

REASONS FOR GRANTING THE WRIT. IF A WRIT IS GRANTED IN NO. 1132

The court of appeals having remanded for a new trial on both claims, the case is not final and is not ripe for review here. Moreover, as set forth in our brief in opposition in No. 1132, the petition in that case presents no question requiring this Court's attention. However, if the Court grants the petition in No. 1132, it should review the entire case and correct the lower court's errors—involving a novel and important question of federal law never decided here—in reversing the denial of the injunction and requiring prior disposition of the damage claim upon the new trial. This conditional cross-petition is filed solely for that reason.[2]

The court below decided an important question of federal law, which has not been, but should be, settled by this Court, if it grants the petition in No. 1132. This Court has never reviewed the authority and responsibility of the trial judge—under Section 16 of the Clayton Act, p. 2-3, *supra*—in adjudicating an antitrust claim for injunctive relief upon simultaneous trial with an antitrust damage claim, pursuant to a complaint combining both types of claims.

Contrary to Section 16, and in the absence of any decision of this Court so requiring, the decision below invests an antitrust plaintiff with absolute power to

---

[2] A similar conditional cross-petition for a writ of certiorari was entertained by this Court in No. 196 at the 1948 Term. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755 (1949), *cert. granted sub nom. McComb* v. *Farmers Reservoir & Irrigation Co.*, 335 U.S. 809 (1948).

undermine the time-honored equity jurisdiction of the federal courts and to deprive an antitrust defendant of his statutory right to invoke that jurisdiction in contesting an antitrust claim for injunctive relief. All the antitrust plaintiff need do, in order to force trial by jury of the purely equitable claim, is incorporate his claim for injunctive relief in his complaint for damages.

Section 16 of the Clayton Act expressly provides for trial of private claims for injunctive relief

> "under the same *conditions* and principles as injunctive relief . . . is granted by courts of equity, under the rules governing such proceedings" (emphasis supplied).

Such "conditions" mean a trial by the court, not a jury. As this Court has ruled,

> "the federal courts . . . administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Insurance Company* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

"Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected." *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949).

The court of appeals improperly and needlessly emasculated Section 16 by holding that trial of a combined complaint—stating claims for money and an injunction—required prior jury hearing of the damage claim and, consequently, "under . . . the doctrine of collateral estoppel," the court's capitulation to the jury verdict in deciding the equitable claim. (371

F. 2d at 271). Assuming *arguendo* that observance of Section 16 poses a problem upon the simultaneous trial of such dual claims, it is not for the courts to ignore the statute.[3]

In truth, however, there is neither any decision of this Court, nor any practical or theoretical necessity, dictating or supporting the court of appeals' conclusion. The only authority it cited—in this phase of its decision—was *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959). But that case does not foreclose simultaneous trial of the damage claim by the jury and the injunction claim by the court. *Beacon Theatres* decided only that a prospective antitrust defendant could not use the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, as a lever to force trial by the court of antitrust claims on which the claimant was entitled to a jury trial. This case presents no such situation. Rather, it presents questions of the proper procedure in hearing a plaintiff's complaint embracing both damage and equitable claims.

There is no need whatever to eliminate trial by the court of the equitable antitrust claim in order to preserve the claimant's right to jury trial on damage issues. "Collateral estoppel"—which was the court of appeals' stumbling block—like *res judicata,* is operative only on the basis of a "former judgment." *E.g., Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955). There need be no "former judgment" in a simultaneous trial of a damage claim by the jury and an injunction claim by the court. The

---

[3] "If the Act develops unanticipated complications, Congress can then meet them to such extent as it may desire to fit the demonstrated needs." *United States* v. *Yellow Cab Company,* 340 U.S. 543, 556 (1951).

traditional function of the jury and judge can each be preserved—without impairment—by simultaneous entry of the separate judgments on the verdict and on the court's determination. Neither will then precede the other. Neither will be a bar to the free adjudication of the issues by the body designated in each instance to adjudicate them.

The court of appeals, in short, became needlessly enmeshed in technical difficulties. "Such difficulties are not insurmountable." *United States* v. *Yellow Cab Co., supra,* 340 U.S. at 555 (1951). They involve simple mechanical matters which — as noted above — can be easily arranged "consistent with the plan of the Federal Rules and the [Clayton Act] to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged." *Beacon Theatres, Inc.* v. *Westover, supra,* 359 U.S. at 508-09.[4]

Should this Court grant the petition in No. 1132, a decision by this Court as to whether the district court's judgment for the defendant—petitioner here—on the equitable claim should be reinstated, is necessary to the complete adjudication of the case. Moreover, the federal courts are daily confronted with antitrust complaints stating dual claims for money damages and for injunction. The guidance of this Court would be useful to the development of a proper and uniform procedure for trying such complaints.

---

[4] In this case, for example, the court of appeals' mandate could readily direct deferral of the entry of judgment on the injunction until the entry of judgment on the jury verdict at the new trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 1132, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

NORMAN DIAMOND
1229 19th Street, N.W.
Washington, D. C. 20036

MELVILLE C. WILLIAMS
69 W. Washington Street
Chicago, Illinois 60602

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 2 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1248

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Cross-Petitioner,

vs.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Cross-Respondent.

BRIEF IN OPPOSITION.

RECEIVED
MAY 2 1967
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Cross-Respondent.

Of Counsel:
McCONNELL, FREEMAN, CURTIS
& McCONNELL,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Question Presented	1
Constitutional Provisions and Statutes Involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS.

Cases.

Beacon Theatres v. Westover, 359 U. S. 500	6, 7, 8
Dairy Queen v. Wood, 369 U. S. 469	6, 8
Emich Motors Corp. v. General Motors Corp., 340 U. S. 558	5
Fitzgerald v. United States Lines, 374 U. S. 16	7
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211	6
Local 167, I. B. T., Etc. v. United States, 291 U. S. 293	5
United States v. Munsingwear, 340 U. S. 36	5
United States v. Oregon State Medical Society, 343 U. S. 326	5

Constitutional Provisions and Statutes.

United States Constitution, Amendment VII	1, 2
Rules of Civil Procedure, Rules 38 and 39	2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1248.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Cross-Petitioner,

vs.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Cross-Respondent.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Where a treble damage judgment has been entered on a jury verdict finding continuing violations of Sections 1 and 2 of the Sherman Act, was the District Court estopped to disregard the judgment and verdict and to enter a separate judgment denying injunctive relief on the ground that no antitrust violation had occurred?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

In addition to Section 16 of the Clayton Act, 15 U. S. C. § 26 (Cr. Pet. 2-3), pertinent to the question presented are:

United States Constitution, Amendment VII:

"In suits at common law, where the value in con-

troversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rules of Civil Procedure, Rule 38(a), (b), and (c). Jury Trial of Right:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constition or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. . . ."

Rules of Civil Procedure, Rule 39(a). Trial by Jury or by the Court:

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of these issues does not exist under the Constitution or statutes of the United States."

STATEMENT.

Cross-respondent filed a one count antitrust complaint which alleged violations of Sections 1 and 2 of the Sherman Act and prayed for treble damages and injunctive relief (R. 3). The complaint was amended and supplemented at the time of trial to allege that the antitrust violations were continuing (R. 26). At commencement of the action cross-respondent also filed an unqualified demand for "trial by jury in this action" pursuant to Rule 38 of the Federal Rules of Civil Procedure (R. 9).

The evidence offered by cross-respondent at the jury trial is detailed in the pending petition for writ of certiorari in *Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc.* v. *Florists' Telegraph Delivery Association,* No. 1132, October Term, 1966. The evidence showed that the Sections 1 and 2 violations were effected through the adoption of membership rules which were intended to destroy cross-respondent's business. The rules were never revoked, modified, or suspended and remained in effect at the date of trial (R. 343). The evidence also showed damage continuing down to the date of trial (Ex. R. 75). On the basis of this evidence the jury returned a general verdict in favor of cross-respondent (R. 39). The District Court entered judgment on the verdict (R. 39) and denied cross-petitioner's motion for judgment notwithstanding the verdict or alternatively for a new trial (R. 48).

At no time either before or during the trial did the District Judge advise the parties that he was conducting a simultaneous non-jury trial on the question of injunctive relief or that he found some issue of fact existed to which cross-respondent was not entitled to a jury trial. Nor did the cross-petitioner request that any issue of fact be tried by the Court.

Following entry of judgment on the jury verdict cross-respondent moved to set for hearing the matter of injunctive relief and the submission of a proposed decree (R. 39). The District Judge denied the motion without comment and subsequently without further hearing or argument *sua sponte* entered findings and conclusions and a separate judgment denying injunctive relief (R. 42-6). The District Judge notwithstanding the jury verdict concluded, "The rules adopted by Defendant Association were not such a restraint upon the activities of Plaintiff as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition within the same general industry . . ." (R. 44). Cross-respondent's motion to vacate the separate judgment was denied (R. 46-7).

On appeal cross-respondent contended that the District Court was estopped to redetermine the antitrust issues raised by the pleadings contrary to the verdict of the jury. The Court of Appeals agreed, stating (Pet. No. 1132, App. B, p. 35):

> ". . . [T]he doctrine of collateral estoppel operated to preclude the District Court from predicating a denial of injunctive relief on a finding with respect to any essential issue common to both claims which finding is contrary to or inconsistent with the jury's resolution and determination of that same issue as implicitly reflected in its general verdict for FNTDN on the damages claim."

Cross-petitioner does not suggest that the record in the jury trial established some independent ground for denying injunctive relief. Instead it urges that the District Judge as chancellor was free to independently determine the question of antitrust violation and reach a decision contrary to the verdict of the jury.

ARGUMENT.

The judgment entered on the jury verdict necessarily determined that cross-petitioner was engaged in continuing violations of Sections 1 and 2 of the Sherman Act and that the violations were causing continuing injury to cross-respondent's business. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569. Cross-respondent accordingly was entitled to adequate injunctive relief as a matter of right. "All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333.

The District Court nevertheless denied such relief on the assumption that the jury's determination did not estop him from reexamining the antitrust issues in the case. This was error because the prayers for treble damages and injunctive relief were based on identical complaint allegations. The jury action was tried first and judgment was entered on the verdict prior to the time the District Judge considered cross-respondent's request for injunctive relief. Under these circumstances the prior money judgment created an estoppel as to all matters necessarily determined by the jury's verdict and was binding on the District Judge. *Local 167, I. B. T., Etc.* v. *United States*, 291 U. S. 293; *United States* v. *Munsingwear*, 340 U. S. 36.[1] The court below in reversing the District Court's separate

1. *I.B.T.* held that defendants found guilty of an antitrust violation in a criminal proceeding could not subsequently relitigate the existence of that violation in a companion government suit for injunctive relief. *Munsingwear* similarly held that a prior finding for defendants on a price ceiling violation injunction count precluded the government from proceeding on a separate treble damage count based on the identical violation.

judgment did no more than correctly apply the estoppel principles announced in these decisions.[2]

In order to avoid the estoppel created by the judgment on the jury verdict, cross-petitioner contends that "damage and equity claims were tried simultaneously" (Cr. Pet. 3) because the complaint contained prayers for both legal and equitable relief. The record, however, does not support the contention that "simultaneous" trials were conducted in the District Court. Cross-respondent filed an unrestricted jury demand in which it demanded a jury trial on all issues of fact raised by the pleadings. " 'In the Federal Courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' " *Beacon Theatres* v. *Westover,* 359 U. S. 500, 510. See also *Dairy Queen* v. *Wood,* 369 U. S. 469.

Moreover, a simultaneous trial to the Court of issues on which cross-respondent had demanded a jury trial could not have been conducted unless "the Court upon motion or on its own initiative [found] that a right of trial by jury of some or all of these issues does not exist under the Constitution or statutes of the United States" (F. R. C. P. Rule 39(a)). No finding was entered pursuant to Rule 39(a) because a simultaneous trial to the Court was not contemplated by the District Judge or requested by the cross-petitioner. In reality it was the District Court's post-trial action in reexamining fact issues laid to rest by

---

2. However, the Court of Appeals erroneously went on to hold that on a new trial cross-petitioner's unclean hands defense, if established, would bar cross-respondent "from both recovery of damages *and injunctive relief.*" This further holding is in conflict with *Kiefer-Stewart Co.* v. *Joseph E. Seagrams & Sons, Inc.,* 340 U. S. 211. See cross-respondent's pending petition for writ of certiorari in No. 1132.

the judgment on the jury verdict which cross-petitioner now characterizes as a simultaneous trial.[3]

But even in the hypothetical case postulated in the cross-petition there would be no place for simultaneous trials of legal and equitable claims for relief where such claims arose out of a common continuing antitrust violation. Such simultaneous trial would permit the unseemly result of two triers of fact reaching contradictory decisions on the same evidence. A similar question was previously considered in *Fitzgerald* v. *United States Lines,* 374 U. S. 16, where this Court held that a maintenance and cure claim joined with a Jones Act claim must be submitted to a jury when both arise out of the same set of facts. This Court observed that "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments" (374 U. S. 21). The teaching in *Fitzgerald* is particularly pertinent in private antitrust litigation where the right to trial by jury is "an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . ." (*Beacon Theatres,* 359 U. S. 504).

Any different decision which would allow a District Court independently to determine the existence of an antitrust violation in a case tried to a jury could work an estoppel and thereby " 'limit the [plaintiff's] opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit' " (*Beacon Theatres,* 359 U. S. 504). Where, as here, the money judgment is reversed and the treble damage claim remanded for a new trial, the District

3. Giving the required estoppel effect to the jury verdict in no sense "undermine[s] the time honored equity jurisdiction of the federal courts" (Cr. Pet. 6) or impinges upon the court's discretion in framing the terms of a decree. In this case, however, the District Judge denied injunctive relief altogether because he disagreed with the jury's determination although at the same time he recognized that the verdict could not be set aside as a matter of law.

Court's contrary determination of equitable issues, unless also reversed, might "'operate either by way of res judicata or collateral estoppel so as to conclude [the plaintiff] with respect [to the issue of violation] at the subsequent trial of the treble damage claim'" (359 U. S. 504). Such a result would be clearly contrary to this Court's decision in *Beacon Theatres*. It would also conflict with this Court's command in *Dairy Queen* that where damage claim "issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined *prior* to any final court determination of respondents' equitable claims" (369 U. S. 479-80).

CONCLUSION.

While the question presented by the cross-petition is not raised by the record, this Court nevertheless may consider the present case an adequate vehicle for expressing its views on the procedure to be employed in trying antitrust complaints involving demands for legal and equitable relief. For this reason cross-respondent does not oppose issuance of a writ of certiorari.

Respectfully submitted,

THOMAS C. MCCONNELL,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
Counsel for Cross-Respondent.

Of Counsel:
MCCONNELL, FREEMAN, CURTIS
& MCCONNELL,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.